No. 2255

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN B. STEVENS & COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,
Defendant in Error,

and

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writs of Error to the United States District Court of the Western District of Washington, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 2255

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN B. STEVENS & COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,
Defendant in Error,

and

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writs of Error to the United States District Court of the Western District of Washington, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index. Page

Names and Addresses of Attorneys.

L. B. da PONTE, Esquire, Northern Pacific Headquarters Building, Tacoma, Washington,

J. W. QUICK, Esquire, Northern Pacific Headquarters Building, Tacoma, Washington,

Attorneys for John B. Stevens & Company.

ROBERT S. HOLT, Esquire, Tacoma Building, Tacoma, Washington,

U. E. HARMON, Esquire, Tacoma Building, Tacoma, Washington,

HUDSON, HOLT & HARMON, Tacoma Building, Tacoma, Washington,

Attorneys for The Frankfort Marine Accident & Plate Glass Insurance Company.

Stipulation as to Printing.

In the above-entitled action it is hereby stipulated and agreed by and between the parties thereto that in printing the record in this case the clerk shall print:

1. The amended complaint, but shall not print the insurance policy, being Exhibit "A" thereto.
2. Answer to amended complaint.
3. Reply and exhibit thereto.
4. Verdict.
5. Judgment.
6. Motion for judgment *non obstante veredicto.*
7. Bill of exceptions.
8. Order on motion for judgment *non obstante veredicto.*

8½. Petitions for writs of errors.

9. Orders allowing the writs of error of both parties.

10. Assignments of errors of both parties.

11. This stipulation as to printing.

12. Stipulation as to the writs of the respective parties and the record and bill of exceptions.

13. Bonds.

That the clerk shall not print the caption or the endorsements on the papers or proceedings, except the filing mark of the Clerk.

L. B. da PONTE,
J. W. QUICK,
Attorneys for Plaintiff, John B. Stevens & Company.

R. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON, [1*]
Attorneys for Defendant, The Frankfort Marine, Accident & Plate Glass Insurance Company.

[Endorsed]: "Filed U. S. District Court Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [2]

Stipulation as to Exhibit "A," Record, etc.

In the above-entitled action it is hereby stipulated by and between the parties thereto that the insurance policy which is plead as Exhibit "A" to the amended complaint in the action is in the same language and is the same as the insurance policy which is made an exhibit to and a part of the Bill of Exceptions in the action, being referred to in said Bill as Exhibit

*Page-number appearing at foot of page of original certified Record.

"A," and that the Court may so treat it in the event the said Exhibit "A" to the amended complaint is stipulated not to be printed in the record.

It is further stipulated and agreed that the writ of error of each of the respective parties hereto, if both sue out one, may be heard together on a single record or transcript and on the Bill of Exceptions taken in the case, and that the record and Bill of Exceptions shall be treated as the record and Bill of Exceptions of each of the parties for the purposes of the said writs of error.

It is further stipulated and agreed that the defendant in said action need not take a Bill of Exceptions to the order overruling its motion for judgment *non obstante veredicto,* but that on the hearing of this cause on its writ of error, the record taken up, including the Bill of Exceptions, shall be deemed and treated as sufficient for the purpose of a review by the Circuit Court of Appeals of the correctness of the ruling of the Court on the motion for judgment *non obstante veredicto* and as containing all the testimony and proceedings in the cause necessary for the review of the question. In other words, that the Bill of Exceptions shall be taken and [3] treated as presenting all the evidence and proceedings in said cause material to and bearing on the question of the correctness of the ruling of the Court on the motion for judgment *non obstante veredicto* made by the defendant.

For the purpose of adjusting the costs in the Circuit Court of Appeals, it is stipulated that one-half of the cost of preparing and printing the record, including the Bill of exceptions, shall be taxed as costs

incurred in the writ of error prosecuted by John B. Stevens & Company, plaintiff in error, and the other one-half shall be taxed as costs incurred in the writ of error of the Frankfort Marine, Accident & Plate Glass Insurance Company, defendant in error, on its writ of error, if it sues out one.

It is further stipulated and agreed that the writs of error of the respective parties may be tried and heard together, if they both sue out writs of error, and that The Frankfort Marine, Accident & Plate Glass Insurance Company may, in brief on the writ of error of John B. Stevens & Company, present and discuss the merits of its own writ of error, and that in its reply brief John B. Stevens & Company may incorporate its answer to the brief of The Frankfort Marine, Accident & Plate Glass Insurance Company on its writ of error, and that, if it desires to do so, the said The Frankfort, Marine, Accident & Plate Glass Insurance Company may file a brief strictly in reply to the answer which the said John B. Stevens & Company may make to its brief in its said reply brief.

L. B. da PONTE,
J. W. QUICK,

Attorneys for John B. Stevens & Company, Plaintiff in the Above-entitled Action. [4]

R. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON,

Attorneys for The Frankfort Marine, Accident & Plate Glass Insurance Company, Defendant in the Above-entitled Action.

[Endorsed]: "Filed U. S. District Court. Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [5]

Amended Complaint.

The amended complaint of the plaintiff, for cause of action against the defendant, alleges:

I.

That plaintiff is a corporation organized under the laws of the State of Washington, and has complied with all of the laws of said State, and has paid its license fee last due, and is licensed to do business in this State, and was at the time of the commencement of this action and at all other times hereinafter referred to.

II.

That defendant is a corporation organized under the laws of the German Empire, with power and authority to do an insurance and indemnity business, and to issue policies or contracts of indemnity indemnifying employers from legal liability and loss on account of personal injuries received by their employees, in consideration of premiums paid therefor.

III.

That on or about the 17th day of November, 1908, in consideration of a premium of $73.00 paid by plaintiff, defendant executed and delivered to plaintiff a certain contract of insurance or indemnity, wherein and whereby defendant agreed and bound itself to indemnify plaintiff against loss arising from legal liability for damages on account of bodily in-

juries or death suffered by any employee of plaintiff resulting from any and every accident of whatsoever nature or cause happening in, upon or about the premises and in the business of plaintiff, not to exceed, however, the sum of $5,000.00 for injury or death of any one employee, for the full [6] period of one year from date of said policy, to wit, for the period commencing the 17th day of November, 1908, and ending the 17th day of November, 1909. And said policy further provided that in case of legal proceedings to enforce a claim against plaintiff covered thereby, that defendant would, at its own expense, undertake the defense of the same. And said policy is hereby referred to attached hereto as "Ex. B" and made a part hereof as fully as if set out herein.

IV.

That while said policy was in full force and effect, and on, to wit, July 19, 1909, one I. B. Merrill, an employee of plaintiff, was injured in, upon and about plaintiff's place of business, in the discharge and prosecution of his duties, and said injury was covered by and within the terms of said policy, and plaintiff was and is fully indemnified by the provisions thereof. That subsequently, to wit, on or about the 29th day of October, 1909, said I. B. Merrill commenced an action against plaintiff in the Superior Court of Pierce County, Washington, seeking to recover damages from plaintiff on account of the injuries received in said accident, as will more fully appear from his complaint filed in said cause, a copy whereof is hereto attached and made a part hereof, marked "Ex. A."

V.

Plaintiff further alleges that upon the commencement of said action of I. B. Merrill against John B. Stevens & Company, immediate notice thereof was given to defendant and summons and complaint served therein was delivered to defendant, with request to defend and care for the same as provided by said policy of insurance, but defendant wrongfully and without cause repudiated all liability upon its said contract [7] and refused to accept said accident or to defend the same at its costs unless plaintiff would release it from liability for any judgment that might be rendered therein, and plaintiff was thereby forced to and did defend said action at its own costs, and thereby incurred and paid the reasonable and necessary sum of $1,072.95. That said action was tried in said court and resulted in a verdict and judgment against plaintiff and in favor of I. B. Merrill in the sum of $6,000.00 and over, and upon appeal to the Supreme Court of the State of Washington said judgment was affirmed, and thereafter plaintiff was forced to and did pay off and satisfy the same in full, including costs and the sum of $250.00 interest accruing on said judgment pending appeal, which sum is included in and a part of said sum of $1,072.95, and said sum, amounting to $6,-072.95, is still due plaintiff from defendant in accordance with the terms and provisions of said policy of insurance.

VI.

Plaintiff further alleges that it duly performed each and everything *thing* required of it by said con-

tract, and fully complied with all the terms thereof, but defendant wrongfully fails and refuses to comply therewith on its part, to plaintiff's damage in the sum of $6,072.95.

Wherefore plaintiff prays judgment against defendant in the sum of $6,072.95, interest and costs.

L. B. da PONTE,
Attorney for Plaintiff.

State of Washington,
County of Pierce.

John B. Stevens, being sworn, says that he is [8] president of plaintiff corporation and authorized to make this affidavit; that he has read the foregoing complaint and the same is true.

JOHN B. STEVENS.

Subscribed and sworn to before me the 20th day of July, 1911.

W. H. MOORE,
Notary Public, Pierce County, Washington. [9]

Exhibit "A."

"In the Superior Court of Washington for Pierce County.

I. B. MERRILL,

Plaintiff,

vs.

JOHN B. STEVENS & CO., a Corporation, Defendant.

COMPLAINT.

Comes now the plaintiff, I. B. Merrill, and for cause of action alleges as follows:

1.

That the defendant is a corporation organized under the laws of the State of Washington.

2.

That on and prior to July 19th, 1909, plaintiff had been and was in the employ of the defendant, John B. Stevens Co., running certain machines situated in its warehouse building on the east side of the city waterway in Tacoma Harbor, Pierce County, Washington.

3.

That on or about July 19th, 1909, plaintiff was ordered by the general foreman in charge of all parts of plaintiff's plant to go and assist in unloading a car of loose grain, which was to be done by means of certain hoppers and screw elevators and appliances furnished by defendant for that purpose.

4.

That while plaintiff was so engaged in said work plaintiff was ordered by said general foreman to shut off the supply of grain coming from said car. That in obeying said order plaintiff moved the lever shutting off the supply of [10] grain from the car to the hopper, and in order to do so it was necessary for plaintiff to reach said car, and the only means provided for doing so was by stepping upon the framework of said hopper.

5.

That as plaintiff stepped upon the framework of said hopper for said purpose the same broke and gave way and plaintiff was precipitated to the ground between the car and the platform, striking heavily in the fall upon plaintiff's right side and back upon cer-

tain parts of the framework of said hopper.

6.

That said framework broke and gave way by reason of being negligently and insecurely fastened and nailed, and by reason of it being inadequately constructed for the purpose for which it was used. That the manner in which plaintiff stepped upon the framework of said hopper for the purpose of shutting off the supply of grain from the car was the usual method used by the employees of defendant for said purpose, and was the only way provided whereby said grain could be shut off, and plaintiff was using due care.

7.

That said framework of said hopper upon which plaintiff was required to step on for said purpose consisted of a board about one inch thick and twelve inches wide, nailed to a horizontal position on the frame of said hopper; that said board was secured to said frame by about four nails, two in either end of said board, one in either end near the lower edge of the same and one in either end near the middle of said board, and the upper part of said board was not nailed or secured [11] in any way to said hopper frame, and as plaintiff stepped upon said frame for said purpose said board split at about the point where it was nailed near the center of its width and threw plaintiff's feet outward and toward the left, throwing plaintiff's right side and back against and across the remaining parts of said hopper frame.

8.

That said board was carelessly, negligently and in-

securely fastened, and its manner of construction and fastening was well known, and should have been known, to said general foreman of defendant, but was entirely unknown to plaintiff, and was not of such nature or so apparent that plaintiff could or should have noticed its condition while engaged in his work.

9.

That by reason of the careless and negligent manner in which said framework around said hopper was constructed, and by reason of the same breaking and giving way with plaintiff as herein alleged, and by reason of the fall by plaintiff received, plaintiff sustained great and permanent injuries as follows: Plaintiff was badly bruised and strained and rendered sick, sore and lame; and plaintiff's right kidney was bruised and maimed to such an extent that it had to be and was permanently removed; and plaintiff was thereby entirely incapacitated from performing work and labor; and plaintiff's back is weak and sore, and plaintiff is advised and believes that he will never more be able to perform his accustomed ordinary work and labor; and that plaintiff is entirely incapacitated from performing any work and labor, and will be so incapacitated for a period of one year, and that after the expiration of one year plaintiff will only be able to perform the [12] lightest, easiest kind of work; and plaintiff alleges that he is severely and permanently injured.

10.

That by reason of the injuries by plaintiff received as herein alleged, plaintiff was put to great expense

for medical and surgical treatment, medicines and nursing.

11.

That plaintiff is of the age of 41 years, and prior to said accident was capable of earning, and was earning, about eighteen dollars per week ($18.00).

12.

That by reason of the premises plaintiff has been damaged in the sum of ten thousand dollars ($10,000), no part of which he has been paid except the sum of $63.00.

Wherefore plaintiff demands judgment for the sum of $9,947.00, together with his costs in this action sustained.

(Signed) FITCH & JACOBS,
Attorneys for Plaintiff."

Verified by I. B. MERRILL.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Aug. 4, 1911. Saml. D. Bridges, Clerk." [13]

Answer to Amended Complaint.

Comes now the defendant in the above-entitled action, and for answer to the amended complaint of the plaintiff therein—

I.

Answering paragraph III thereof, defendant denies that for the consideration therein referred to, it executed and delivered to plaintiff a contract of insurance, or indemnity, whereby it agreed and bound itself to indemnify plaintiff in the manner set forth in the said paragraph, and whereby it agreed

to undertake, at its own cost, the defense of the legal proceedings to enforce a claim against the plaintiff in the manner set forth in the said paragraph; but defendant alleges that the said contract of insurance, or indemnity, provided, as a condition precedent to its indemnifying plaintiff against the said loss arising from legal liability, as well as the defense of the legal proceedings, therein referred to, at its own expense, that the plaintiff, upon the occurrence of an accident, whether any claim was made with respect thereto or not, would immediately, and at the latest within ten days, give notice of said accident in writing to this defendant, as provided in said policy, and as set forth in clause II, on page I, of Exhibit "B" to the said complaint.

II.

Answering paragraph IV of said complaint, defendant denies that one I. B. Merrill, an employee of plaintiff, was injured on July 19, 1909, and as to the other allegations in the said paragraph, defendant denies any knowledge or information [14] thereof sufficient to form a belief as to the truth of them, and each of them, except that it denies positively that the plaintiff was, or is, fully, or otherwise indemnified by the provisions of the policy therein referred to;

III.

Answering paragraph V of the said complaint, defendant denies that, upon the commencement of the action of I. B. Merrill vs. John B. Stevens & Company, immediate notice thereof was given to this defendant, and it denies that it wrongfully or with-

out cause repudiated liability upon the said contract, but it admits that the summons and complaint, therein referred to, were delivered to it, and it admits that it refused to accept the accident, or to defend the said action, unless the plaintiff would release it from liability for any judgment that might be rendered therein, and as to the other allegations in the said paragraph contained, defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of them, and each of them, except it denies positively that the sum of Six Thousand, Seventy-two and 95/100 Dollars, or any other sum, is due to the plaintiff from it, in accordance with the terms and provisions of said policy, or otherwise.

IV.

Answering paragraph VI of said complaint, defendant denies each and every the allegations therein contained.

AND FOR A FURTHER ANSWER to plaintiff's complaint, and as a FIRST AFFIRMATIVE DEFENSE THERETO, defendant alleges,—

That the policy, or contract, or insurance, or indemnity referred to in plaintiff's amended complaint, was issued to [15] the said plaintiff in the State of Washington, and that the said I. B. Merrill, referred to in the said complaint, received the injuries therein referred to on or about the 15th day of June, 1909, and that the said plaintiff well knew that he had received the said injuries, but that, notwithstanding such knowledge, the said plaintiff did not give notice of the said injury or the

accident from which it arose, in writing or otherwise, to this defendant, or to its duly authorized representative for the locality in which the said contract was issued until the latter part of October, or the first part of November following the said accident and injury, and for this reason this defendant refused to undertake the defense of the action referred to in plaintiff's complaint, and denied any liability to the plaintiff under the said policy, or contract, on account of the said failure to file said notice, the giving of the said notice being made a condition precedent, by the terms of said contract of insurance, to any obligation on the part of this defendant to either defend the suit referred to in plaintiff's complaint, or to any liability under the said contract of insurance for any loss or damage sustained by the said plaintiff on account of the said accident and injury and its legal liability for damages therefor.

AND FOR A FURTHER ANSWER to plaintiff's complaint, and as a SECOND AFFIRMATIVE DEFENSE THERETO, defendant alleges,—

That the contract of insurance or indemnity, referred to in plaintiff's amended complaint, was issued to the plaintiff in the State of Washington, and that thereafter, and on or about the 15th day of June, 1911, the I. B. Merrill referred to in said complaint met with an accident and sustained the [16] injuries referred to in said complaint, as the plaintiff well knew at the time thereof; but that the said plaintiff, notwithstanding the said accident and the said knowledge, failed to give to this defendant no-

tice, in writing or otherwise, of the said accident or injury, and failed to give any such notice to its authorized representative in the locality where the said policy or contract was issued until the latter part of October, or in the first part of November following the said accident and injury, and that, by reason of the failure of the said plaintiff to give the said notice, and its failure to investigate the accident, and to preserve the testimony, the evidence became destroyed and the witnesses scattered, and, at the time the action referred to in plaintiff's complaint was brought, by reason of the neglect of the plaintiff to properly attend to the matter and by reason of certain changes and alterations that it had made in the structure at which the accident occurred, it was no longer possible to successfully defend the said action.

AND NOW, HAVING FULLY ANSWERED, defendant prays to be hence dismissed, with its costs and disbursements in this behalf expended.

HUDSON, HOLT & HARMON,
Attorneys for Defendant. [17]

United States of America,
Western District of Washington,
State of Washington,
County of Pierce,—ss.

R. S. Holt, being first duly sworn, states on oath that he is one of the attorneys for the defendant in the above-entitled action; that he has read the above and foregoing answer, knows the contents thereof and believes the same to be true; that affiant makes this affidavit as attorney for defendant, for the rea-

son that all the material allegations of the said answer are within his personal knowledge.

R. S. HOLT.

Subscribed and sworn to before me this 31 day of July, 1911.

[Notarial Seal] U. E. HARMON,
Notary Public in and for Said County and State,
Residing at Tacoma, Washington.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Sep. 14, 1911. Saml. D. Bridges, Clerk." **[18]**

Reply to Answer to Amended Complaint.

Comes now the plaintiff and makes reply to defendant's answer to plaintiff's amended complaint as follows:

I.

Replying to paragraph "II" of said answer, plaintiff alleges that in said original action of I. B. Merrill vs. John B. Stevens & Company it is alleged in plaintiff's complaint that said accident for which said suit was brought happened on the 19th day of July, 1909, as appears from the complaint therein attached to plaintiff's amended complaint, and said allegation was put in issue by the answer filed therein, as appears from said answer, a copy whereof is hereto attached, marked "Ex. A." That one of the issues tried and determined in said cause and found out passed upon as a basis for the judgment rendered in said suit of I. B. Merrill vs. John B. Stevens & Co. was whether said accident occurred on

the 19th day of July, 1909, or on or about the 15th day of June, 1909, and said issue was determined against this plaintiff, defendant in said suit of I. B. Merrill, and it was adjudicated that said accident happened on said 19th day of July, 1909, and said finding and judgment is conclusive on the parties hereto, and plaintiff now pleads the same as *res adjudicata* of the issue now sought to be raised by defendant as to the date of said accident. **[19]**

II.

Replying to defendant's first affirmative defense, plaintiff admits that the policy was issued in the State of Washington, but as to the allegation that said accident happened on or about the 15th day of June, 1909, plaintiff here adopts the plea of *res adjudicata* stated in paragraph "I" of this reply. Plaintiff denies that it knew of the injuries or accident to the said I. B. Merrill on or about the 15th day of June, 1909, or at any time prior to the 19th day of October, 1909, but admits that it gave no notice of said accident prior to said 19th day of October, 1909, and alleges that it had no notice or knowledge whatever of the accident or injury to the said I. B. Merrill until the 19th or 20th day of October, 1909, and immediately upon learning thereof and on the said 19th or 20th day of October, 1909, it gave due notice to defendant's duly authorized representative for the locality in which said contract was issued in writing, and defendant never at any time made objection to the form or sufficiency of said notice, except only that defendant pretended that same was not given in time, as required by the terms of said

contract of insurance, and plaintiff admits that defendant declined to admit liability for said accident, giving as reasons therefor the failure of plaintiff to give immediate notice of said accident, as required by said contract. And for further reply to said first affirmative defense, plaintiff alleges that said policy provided "that upon the occurrence of an accident ..... the insured shall immediately, and at the latest within ten days ..... give notice in writing of such accident," etc., and it was impossible for plaintiff to comply therewith, for the reason that it had no knowledge of said accident **[20]** until long after the time said provision required notice to be given thereof.

III.

Replying to defendant's second affirmative defense, plaintiff here adopts the reply to defendant's first affirmative defense stated in paragraph "II" of this reply. And further replying thereto, plaintiff denies that by reason of its failure to give notice and investigate the accident, the evidence became destroyed and the witnesses scattered, and by reason of certain alterations made in the structure at which the accident occurred, it was no longer possible to defend said action. But plaintiff admits that there was an alteration made in said structure, but alleges that the same was slight and immaterial and in no way prejudicial to the defense of said case, and said alteration was made prior to the time that plaintiff knew of said accident or that said structure was claimed by said I. B. Merrill to have been responsible therefor or connected therewith in any way.

And plaintiff alleges that said structure was totally destroyed by fire without its fault long prior to the time said suit of Merrill was or could have been tried, and in any event could not have been available for use as evidence therein.

Wherefore plaintiff prays as in its complaint.

L. B. Da PONTE,
Attorney for Plaintiff. **[21]**

State of Washington,
County of Pierce.

John B. Stevens, being sworn, says he is acquainted with the foregoing reply, and the matters and things therein stated are true.

JNO. B. STEVENS.

Sworn to and subscribed before me the 1st day of August, 1911.

F. M. HARSHBERGER,
Notary Public, Pierce Co., Wash. **[22]**

EXHIBIT "A."

In the Superior Court of the State of Washington, in and for the County of Pierce.

No. ——.

I. B. MERRILL,

Plaintiff,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,

Defendant.

ANSWER.

Comes now the defendant in the above-entitled action and in answer to plaintiff's complaint therein,—

I.

Defendant admits that at the time referred to in paragraph numbered 2 of plaintiff's complaint, he, the said plaintiff, had been and was in the employ of this defendant, running certain machines situate in its warehouse, but it alleges in this connection that the running of the said machines was only one of the duties which plaintiff was employed to perform, and that among his duties was that of assisting in the unloading of grain from the cars to the elevators in defendant's warehouse.

II.

Defendant denies each and every the allegations contained in paragraph numbered 4 of said complaint, except it admits that the plaintiff moved the lever shutting off the supply of grain from the hopper to the screw.

III.

Defendant denies each and every the allegations contained in paragraphs numbered 3, 5, 6, 7, and 8 in said complaint contained.

IV.

Answering paragraph 9 of said complaint, defendant denies that the plaintiff sustained great or permanent or any injuries by reason of the careless or negligent manner in which the framework around the hopper referred to in said paragraph was constructed, or by reason of the said framework breaking or giving way with plaintiff; and as to the other allegations in the said paragraph numbered 9 contained, defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of them and each of them.

V.

Defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations and each of them, contained in paragraphs numbered 10 and 11 of said complaint, except it admits that plaintiff was earning about eighteen dollars ($18) per week at the time therein referred to. **[23]**

VI.

Defendant denies the allegations, and each of them, contained in paragraph numbered 12 of said complaint.

AND FOR FURTHER ANSWER to plaintiff's complaint, and as a first affirmative defense thereto, defendant alleges:

That the risks and the dangers of performing the work which plaintiff was performing at the time of his alleged injury, in the manner in which he was then performing the same, were open, patent and obvious to plaintiff, and were well known to him, or in the exercise of ordinary prudence and care should have been known to him.

And for further answer to plaintiff's complaint, and as a second affirmative defense thereto, defendant alleges:

That at the time of the alleged injuries to plaintiff referred to in his complaint, as was well known to the said plaintiff, there was a safe way in which he might have performed the work in which he was then engaged, as well as an unsafe way, but that with the said knowledge, the said plaintiff voluntarily elected to perform the said work in the un-

safe way, and while so doing he was injured, and the injuries so received by him are the same injuries referred to in his complaint.

And for further answer to plaintiff's complaint, and as a third affirmative defense thereto, defendant alleges:

That the said plaintiff, at the time of his alleged injuries, negligently, carelessly and unnecessarily placed himself in a dangerous position where he was likely to slip and fall, and while in the said position he did slip and fall, and was thereby injured, and the injury so received is the same pretended injury referred to in his complaint.

And now having fully answered, defendant prays to be hence dismissed, with its costs and disbursements in its behalf expended.

(Signed) HUDSON & HOLT,
Attorneys for Defendant.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Aug. 4, 1911. Saml. D. Bridges, Clerk." **[24]**

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess its damages at the sum of $286.40 *Dollars.*

ANDY HILBURGER,
Foreman.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." **[25]**

Judgment.

BE IT REMEMBERED that this cause came on to be heard before the Court and jury on the 3d day of January, 1913, and plaintiff and defendant appeared and announced ready for trial.

Thereupon a jury was duly empaneled and sworn to try the issues, and counsel for plaintiff made his opening statement to the jury of the matters and things plaintiff expected to prove.

Thereupon defendant moved the Court to direct a verdict in its favor upon said opening statement, and said motion having been fully argued by counsel and considered by the Court, the Court announced that said motion should be denied, but that in his view of the law plaintiff was only entitled to recover the costs paid by him in defending the Merrill suit in the Superior Court, and was entitled to no other relief, to which ruling both parties excepted and exceptions were allowed.

Thereupon the trial proceeded and the Court submitted to the jury the issue with respect to the amount paid by plaintiff in defense of said suit of I. B. Merrill in the Superior Court, and instructed the jury that they should not allow in any event more than said sum, which it was agreed by the parties amounted to $286.40, and thereupon the jury retired to consider their verdict, and thereafter brought in a verdict in favor of plaintiff and against defendant in the sum of $286.40. [26]

It is therefore Ordered, Adjudged and Decreed by the Court that plaintiff do have and recover of and

from the defendant said sum of $286.40, and plaintiff's cause of action for the sum of $5,000.00, amount of claim by reason of the judgment rendered and paid by plaintiff in the said Merrill suit, as well as the costs paid by plaintiff for the appeal of the said Merrill suit, be and the same is hereby dismissed with prejudice.

And to so much of said judgment as denied recovery by plaintiff for said sum of $5,000.00, interest thereon and costs of the appeal to the Supreme Court, plaintiff duly excepted and its exception is allowed, and defendant duly excepted and is allowed an exception to so much of this judgment as allowed to recover against it in the sum of $286.40, and costs of this action.

Upon application of plaintiff in open court and stipulation of the parties, it is hereby ordered that plaintiff have thirty (30) days from the date of this judgment in which to file and settle a bill of exceptions herein.

Dated this 4th day of January, 1913.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form.
R. S. HOLT.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 4, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy."
[27]

Motion for Judgment Non Obstante Veredicto.

Comes now the defendant in the above-entitled action and moves the Court for judgment in said action in its favor notwithstanding the verdict of the jury, for the following reasons:

I.

By the pleadings an immaterial issue was presented and the defendant was entitled to judgment thereon because it affirmatively appeared therefrom that notice was not given by the plaintiff within ten days after the date of the accident, as required by the policy, and no excuse for a failure to give the said notice was shown thereby.

II.

For the reason that the evidence in the case was confined by the Court to evidence with respect to the expenses incurred by plaintiff in defending the case of I. B. Merrill against it in the Superior Court of Pierce County, Washington, and plaintiff was not entitled to recover these expenses for the reason that its right to recovery depended on its compliance with the requirement of the provision of the policy on which the action is based, requiring it to give notice within ten days after the date of the accident, which, as appears from the pleadings, the admissions and the evidence, it did not do, and for the failure to do which it had no valid excuse.

III.

Because the evidence in the case showed that the plaintiff had failed to comply with the requirement of the [28] provision of the policy on which its

action is based, requiring it to give notice of the accident within ten days, and it appeared affirmatively from the pleadings and the evidence in the case, and the admissions, that no such notice was given, and defendant asked the Court for a peremptory instruction instructing the jury to find a verdict in its behalf with respect to said subject.

This motion is based on the pleadings and other proceedings in the cause, on the opening statement of counsel for the plaintiff, and on the testimony in the case.

R. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON,
Attorneys for Defendant.

Due service of the within and foregoing motion for judgment *non obstante veredicto,* by receipt of a true copy thereof, is hereby admitted this —— day of February, 1913, and it is agreed that it may be taken up and presented without further notice to us.

L. B. da PONTE,
J. W. QUICK,
Attorneys for Plaintiff.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [29]

Order Overruling Motion for Judgment Non Obstante Veredicto.

This day, by consent of both parties, there came on regularly for hearing the motion of the defendant

in the above-entitled action for an order for judgment, notwithstanding the verdict of the jury in the above-entitled action, and the Court having fully heard and considered the same, and being of the opinion that the said motion should be denied,—

IT IS THEREFORE ORDERED that the said motion for judgment *non obstante veredicto* be, and the same is hereby overruled and denied, to which the said defendant then and there excepted and had its exception allowed.

Ordered this 15th day of February, 1913, as of Feb. 6th, 1913.

EDWARD E. CUSHMAN,
Judge.

O. K.—J. W. QUICK.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [30]

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on duly and regularly to be heard on the 3d day of January, 1913, in this court, before the Honorable Edward E. Cushman, Judge, and a jury, the plaintiff being represented by its attorneys, J. W. Quick and L. B. da Ponte, and the defendant being represented by its attorneys, Messrs. Hudson, Holt & Harmon, and thereupon the following proceedings were had, to wit:

The jury being duly empanelled and sworn, Mr. da Ponte, counsel for plaintiff, made the opening statement to the jury as follows, to wit:

[Statement of Counsel for Plaintiff to Jury, etc.]

"Gentlemen of the Jury:

This suit is an action upon an employer's liability policy, the plaintiff being engaged in the feed business and having in his warehouse machinery with which he compresses and bales and puts up feed; that it is necessary to use machinery, and this machinery, as we all know, is more or less dangerous to the men who have to work around it. It has been discovered that employees engaged in working around moving machinery will be injured from time to time in spite of all care and protection which the owner may take to guard them from danger. So that in order to protect an industry from an overwhelming loss these indemnity companies have been organized, and for a certain premium they will insure an employer up to a certain amount, in this case, five thousand dollars, against liability for injuries to their employees, and then no particular industry is perhaps overwhelmed or wiped out of existence, possibly, by some misfortune of this kind. **[31]**

In this case the plaintiff had an insurance policy which indemnified it up to $5,000 for injuries received by employees in its service. In June or July of 1909, Mr. Merrill, an employee, was injured while, as he claimed, stepping across from the platform of the warehouse to a car loaded with grain, for the purpose of shutting off the grain from the car as it ran into the hopper. He alleges that he stepped on the hopper from the platform, and that it broke and precipitated him to the ground, through which he received a severe injury. But he did not realize at

that time that he was seriously hurt, and continued to work from the time of the accident, whether in June or July, until the latter part of August, at which time he left and went to the hospital, and it was found he had dislocated or broken a kidney, and he was forced to undergo an operation and the kidney was removed. Then about the 19th of October he employed counsel to represent him in his claim, and they served notice, or a letter, upon Mr. Stevens, notifying him that Mr. Merrill was injured while in their service and employ and through their negligence. Mr. Stevens turned over this notice to the insurance company, the defendant here, with the request that they defend the action, as obligated by their policy, but the insurance company refused to do so, stating that they had not been notified of the accident within, immediately after, or at the latest within ten days after the accident occurred. They declined, and Mr. Stevens was forced to defend the action, and employed Hudson, Holt & Harmon, Mr. Holt here, to defend him in this suit, and the case was tried and resulted in judgment against Mr. Stevens in favor of Mr. Merrill for a little more than six thousand dollars. The case was appealed to the Supreme Court and the judgment was affirmed by that Court, and thereupon [32] Mr. Stevens satisfied the judgment in full, including costs, the total amount paid being something over seven thousand dollars. We claim here, however, only five thousand dollars, because the policy only insured for five thousand dollars, together with the costs of defending the action, which amount to about one thousand dollars,

or twelve hundred dollars and interest. There is no dispute as to the facts which I have stated, but the insurance company defends on the sole ground that the notice was not given as provided in this clause of the policy:

"That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately and at the latest within ten days, or within the time fixed for giving notice of accident under liability insurance policies by any statute law of a State in which the policy is issued, give notice in writing of such accident to the company addressed to the manager for the United States at the office of the company in New York, or to the duly authorized representative for the locality in which this policy is issued. If thereafter the assured shall receive notice of any claim arising out of the accident duly reported to the company as above provided, or of any legal proceedings to enforce said claim, he shall within three days' notice to the company in like manner, and shall forward to the company every summons and process as soon as the same shall have been served on him."

There is no issue here but that the plaintiff complied with all of the provisions of this paragraph, except that notice was not given immediately, or within ten days after the accident occurred. We have pleaded as an excuse why that notice was not given that the accident to Merrill was not known to have occurred. We will expect to show that neither Mr. Stevens nor [33] Mr. Moore knew anything about any accident to Merrill until they received the

notice from Fitch & Jacobs, attorneys for Merrill, which was served on them October 19th, several months after the accident, and that as soon as they learned of the accident they notified the insurance company.

We contend that although, even if it be a fact, as Mr. Holt will contend, that some subordinate employees around the building may have known something or some circumstance connected with the accident, that is wholly insufficient, and that it was never reported to Mr. Stevens or Mr. Moore, or to anyone who had any knowledge of the policy, or had anything to do, so far as this plaintiff corporation is concerned, with giving the notice. And if the plaintiff is able to prove that it gave notice as soon as it received the notice itself, that the policy was fully complied with. Especially do we contend that in view of the further proposition which will be presented, that is, whether the insurance company was prejudiced in any way by the failure to get the notice sooner. It is our contention that even if it be practically admitted, as they contend, that the mere omission to give notice is not an excuse or justification for their refusal to comply with the written obligation, unless they can show they were injured in some way. Mr. Holt alleges in his answer that—

Mr. HOLT.—It seems to me that this is rather in the way of an argument rather than an opening statement, and I would object to it.

The COURT.—Counsel will confine his statement to what is expected to be proved.

Mr. da PONTE.—They contend that the witnesses

became scattered, due to the failure to give this notice, and [34] that some alterations were made in the structure, and that therefore they were prejudiced, and the suit of Merrill could not successfully be defended. We will expect to show that so far from that being the case, that at the time we gave them notice, every single witness to the accident was down there at the warehouse the same as at the time the accident happened; and that at the trial of the Merrill case every single witness appeared in court and testified, except one, and he had left the country before the case came to trial, but after the insurance company was duly notified that this accident occurred and that they would be expected to handle it.

So far as the change in the structure which is pleaded, we will show that Mr. Merrill never told anybody or claimed to anybody around the premises that this hopper had anything to do with causing his accident, or that the plank or hopper were broken, until long after the accident, in November, and that there was a slight alteration made for the purposes of the business in this hopper, but that it was in no way prejudicial because before the case came to trial and before they could have used it, the entire place was burned up and destroyed by fire, without the fault of Stevens. Our contention is that it is a simple and mere technicality upon which they are seeking to escape their just obligations; that is our contention, and if we prove that, under the Court's instructions we will expect a verdict.

I should have stated, also, that as soon as the summons and complaint were served, they were turned

over to the defendant here, and they refused to handle the case.

Mr. HOLT.—"Under the pleadings in this case there is a flat allegation of compliance and notice. I understand, now, [35] from Mr. da Ponte's opening statement, that he agrees and concedes that as a matter of fact no notice was given until about the 19th or 20th of October, and I now desire to present to the Court a legal question which could not be presented under the pleadings before, and to move the Court for judgment on the opening statement of counsel, following the practice of the Supreme Court of the United States in the Ascanyon case, with which your Honor is familiar."

"It being now stated affirmatively that although the accident happened in June or July, no notice was given until October, I desire to present the question.

"It was stated that notice was not given because the assured did not know of it, and I desire to present the question that knowledge on the part of the assured cuts no figure."

The COURT.—"The jury will be excused until two o'clock this afternoon."

The COURT.—"Mr. Holt, your motion is for an instructed verdict on the statement."

Mr. HOLT.—"Yes; for judgment upon the opening statement. A nonsuit would be satisfactory."

Ruling of the Court [on Motion for Instructed Verdict].

The COURT.—"In many contracts it may be that time is not of the essence of the contract unless expressly so provided in the contract, but in a contract of this kind, where the insurance company under-

takes to handle the litigation or undertakes to settle the case, where the specific provision of this kind is contained, it is clear that the liability under the policy does not attach until the judgment has been paid, it will be concluded that it is a condition precedent, even if it were not so provided in section 16 of the policy, as the Court concludes [36] that it is. The limitation of ten days must refer to something, and it is the Court's conclusion it refers to the time of the accident. This policy was prepared by the company, and the Court would strain the language as far as possible, and still keep within the meaning of it, to protect the person insured, but this language is not capable of any other construction in this policy than that it means that notice should be given at the latest within ten days from the accident, not ten days from the time the insured learned of it. The language "Whether claim is made for it or not," is a proviso which throws light on that construction—additional light, and leads the Court to believe that no other meaning was intended.

There is one proposition in the policy which has not been discussed that leads the Court to believe that the motion will have to be denied. The company was not only liable up to the amount of five thousand dollars for loss on account of the injury, but it undertook the defense of the case if one was brought. There are two things which the company undertakes. One to pay any judgment which may be recovered against the assured, and then besides to conduct the defense. There might be some persuasiveness in the argument of counsel if it were not

for sec. 16, which says: "And the special agreements and warranties herein contained shall be construed as conditions precedent to the payment of any loss under this policy. By that it limits conditions precedent to the payment of loss under the policy. Therefore the question would still be open as to the thousand dollars or more that they claim of expenses paid out in defending the case."

Mr. HOLT.—"Can the testimony be limited in the case [37] to that?"

Mr. da PONTE.—"On that point I think we should follow the common practice and submit all the testimony to the jury, and then the Court can control it on motion for judgment notwithstanding."

The COURT.—"I think you can protect yourself by making offers of proof. I think the case should be tried on what the Court considers the law to be, and if Mr. Holt objects to any testimony from what has been indicated, I will have to sustain the objection."

Exception allowed to both parties.

[Testimony of John B. Stevens, for Plaintiff.]

JOHN B. STEVENS, a witness called by plaintiff, having been sworn, testified:

My name is John B. Stevens. I am the president and manager of the plaintiff company, and Mr. Moore and myself are in active charge of the business of the company. The business of the company is wholesale hay and grain.

The company took out a policy of insurance with the defendant, and the premium on the policy has been paid.

(Testimony of John B. Stevens.)

This is the policy. The policy was received in evidence and marked Plaintiff's Exhibit "A."

An accident occurred during the period covered by the policy, and an action was brought to recover damages therefor.

Q. "Will you please state when you first heard or knew of that accident?"

Mr. HOLT.—"I object to that as irrelevant and immaterial."

The COURT.—"Objection sustained." Plaintiff excepted and its exception was allowed. [38]

Suit was brought against John B. Stevens & Co. about the 1st of November, 1909, but before commencing the suit we got a letter or notice from Fitch & Jacobs, attorneys for Merrill. This is the letter.

Letter offered in evidence.

Mr. HOLT.—"Without waiving any objections to the relevancy and competency of the letter, I do waive all proof as to the genuineness of it."

Letter received and marked Exhibit "B."

Q. "State whether or not you had any notice or knowledge of that accident or that it was claimed to have occurred on your premises until you got that letter. A. No, sir."

Mr. HOLT.—"I object and move that the answer may be stricken as incompetent and immaterial."

The COURT.—"The answer may be stricken."

Mr. da PONTE.—"The plaintiff excepts, and expects to prove by the witness that this letter of Fitch & Jacobs is the first knowledge that he or any other officer of the plaintiff company had of this accident."

(Testimony of John B. Stevens.)

Mr. HOLT.—"To which the defendant objects as irrelevant and immaterial."

The COURT.—"Overruled and denied. Exception allowed to plaintiff."

WITNESS.—It was my business or Mr. Moore's to give notice to the insurance company of an accident. The notice of the accident received from Fitch & Jacobs was sent the same day to Mr. Opie, the agent of the insurance company in this territory and the party from whom we got the policy. [39]

Suit was afterwards brought against us and the summons and complaint were sent to Mr. Ramm, the general agent of the company to whom we had been referred by Mr. Opie, or Mr. Holt, the attorney for the insurance company. It was mailed the same day we got it."

Mr. HOLT.—"There is no question as to that."

The insurance company refused to take the case or defend it on the ground that they had not been notified of the time the accident occurred. That was the only ground. I defended the action myself, and it resulted in a judgment against us for $6,100.00.

"It is stipulated that judgment was rendered on the 10th day of February, 1910, in the Superior Court of the State of Washington in and for Pierce County, against the defendant, John B. Stevens & Company, in favor of I. B. Merrill in the sum of $6,100.00, together with costs."

The case was appealed to the Supreme Court of the State and affirmed, and I paid the judgment with a check for $6,539.30, which includes interest and costs.

(Testimony of John B. Stevens.)

Mr. HOLT.—"We admit it was paid and satisfied."

I paid as costs of defending the suit in the Superior Court the sum of $250.00 to Mr. Holt as attorneys' fees.

I paid $167.60 to Mr. Holt for appealing the case.

Mr. HOLT.—"I object as irrelevant and immaterial."

The COURT.—"The objection will be sustained as being no part of the expense of the defense." Exception allowed.

Mr. QUICK.—"In order to make that full and complete, I understand the Court holds the expense of the appeal to the Supreme Court is not a proper item to be recovered." [40]

The COURT.—"That it is not a part of the defense provided for in the policy."

WITNESS.—I was advised to appeal the case by counsel. I paid in addition $10.00 for reporting the trial, and I also paid $86.00 for copying the evidence for use in the Supreme Court.

Objection to the item incurred on the appeal sustained.

Other costs of the appeal consisting of $31.50 for printing brief; $9.75 for reply brief; $10.00 transcript; $50.00 paid attorneys for filing a motion for rehearing; $28.80 for making an oral argument, were all objected to as not being part of the expense of defending the case, and the objections were sustained and an exception taken and allowed.

It is admitted that plaintiff demanded payment of defendant of the sums sued for, and was refused.

In addition to the foregoing items plaintiff sustained expense of witnesses attending court on the trial of the Merrill case, the amount whereof was agreed by the parties to be $26.40.

Mr. da PONTE.—"I now offer to prove by this witness the facts with respect to the happening of the accident, and that the plaintiff had no notice of it, and that the defendant in any case was not prejudiced by not having notice sooner; that all of the witnesses were available at the time that notice was given to the defendant of the accident."

Mr. HOLT.—We enter our objection that it is irrelevant and immaterial.

The COURT.—"Objection sustained." Exception taken and allowed. [41]

Mr. QUICK.—"The plaintiff now offers to prove by the witness, W. H. Moore, that he was secretary of the John B. Stevens Company at the time Mr. Merrill was injured and for several months thereafter, and in charge of the office of the company and the business of the company as transacted at the office, and that he did not know anything about the alleged injury or claim that Mr. Merrill had been injured until the time of receiving the letter of notification from attorneys Fitch & Jacobs, which has been referred to by the witness, Stevens."

Mr. HOLT.—"I object to that part of the proffered testimony going to show that Mr. Stevens or the company did not know of the accident until the time when the notice was given, as irrelevant and immaterial."

The COURT.—"Objection sustained and plaintiff

allowed an exception."

Thereupon plaintiff rested its case, and defendant offered no testimony and rested its case.

The Court thereupon delivered instructions to the jury, and the same are, so far as material, as follows:

[Instructions.]

"Gentlemen of the Jury:

This case, as is disclosed by the pleadings which you will take with you, when you retire, was brought by John B. Stevens & Company against the defendant insurance company to recover under an insurance policy that the defendant company had given the Stevens Company to indemnify it on account of loss on account of injuries sustained by its employees. The policy covered loss up to five thousand dollars on account of any single injury, and also provided that the defendant insurance company would defend any suit brought against the John B. Stevens Company on account of injury received by any of its employees. [42] The complaint alleged that this accident to this man Merrill, on account of whom the suit was brought, happened on the 14th day of July, 1909; and it has been proven and pleaded here that notice was not given to the insurance company of this accident until October following the accident. The policy itself provided that notice must be given within ten days, not later than ten days after the accident, and the Court has ruled that as long as the plaintiff did not give notice, that there could be no recovery against the defendant company on account of the injury itself.

The plaintiff here defended this action itself—

asked the insurance company to defend it, and that company refused so far as this evidence goes, if you believe it, to do so, and then the plaintiff's testimony is that John B. Stevens & Company defended the action. The Court has ruled that while there could be no recovery against the defendant on account of the loss it sustained in paying the judgment which Merrill recovered, because they did not give the ten days' notice, yet that the insurance company undertook to defend that suit regardless of whether the ten days' notice was given, and that it was its duty when called upon to do so without requiring the plaintiff, John B. Stevens & Company, to release it beforehand on account of any judgment that might be obtained. So you will not concern yourselves with that part of the pleading that goes to the liability or claimed liability on account of the judgment which John B. Stevens & Company had to pay in the end. You will confine your attention to the evidence introduced here regarding those costs and expenses which the plaintiff was put to in defending the case in the Superior Court of Pierce County after the defendant company refused to defend for it. [43]

In this case the burden of proof is upon the plaintiff to prove that this policy was given as described here in the complaint, and that there has been a breach of it in the particular that I have pointed out to you, that is, that the defendant company did refuse to carry on, at its own expense, the defense of this case after it was brought. And also before the plaintiff can recover it must show what expense it was put to on account of that breach by the defendant company of this policy in refusing to defend the case.

The plaintiff must show these three things by a preponderance of the evidence before it can recover. Counsel have conceded in Court that the expenses in the Superior Court that plaintiff was occasioned by defending this suit was $260.00, and for certain witnesses, twelve in number, and the plaintiff would be entitled to recover for its liability to pay those witnesses two dollars a day for the time they attended on the Court, and ten cents a mile for the distance they had to travel, which the plaintiff does not claim was more than two miles, one mile going and one coming. Counsel have also conceded that they do not claim more than one day for the witnesses. $26.40 is the amount for the witnesses, and $260.00 for attorneys and court costs, which would make $286.40 expense that the plaintiff was put to in defending the case after it claims that the defendant refused to defend for it.

You are instructed that as under the law as the Court has settled it you cannot return a verdict for more than $286.40, because there has been no proof under the issues that the Court has allowed to go to the jury of any damage on account of the breach for any greater amount than that." [44]

Thereupon the jury retired to consider their verdict, and thereafter returned into court with a verdict in favor of the plaintiff and against the defendant in the sum of $286.40.

The plaintiff duly excepted to the charge to the jury and to the refusal of the Court to submit the cause to the jury on the issues made by the pleadings and plaintiff's opening statement.

And plaintiff excepted to the Court's charge to the jury that plaintiff could not recover in any event more than $286.40.

And plaintiff now presents this bill of exceptions, and prays that the same be settled and allowed as a bill of exceptions in this cause.

J. W. QUICK,
L. B. da PONTE,
Attorneys for Plaintiff. [45]

Amendments Allowed to Bill of Exceptions.

Comes now the defendant and proposes the following amendments to the bill of exceptions, viz.:

(1) That when the plaintiff offered to prove the payment of an attorney's fee for the trial of the case of Merrill against Stevens in the Superior Court of Pierce County, defendant objected thereto on the ground that it was irrelevant and immaterial, because there could be no recovery of any kind whatever therefor. The objection was overruled and an exception allowed.

(2) By Mr. Holt, to witness Stevens:

Q. "After the insurance company refused to defend that action you employed me to defend it for you? A. Yes, sir.

Q. Or my firm? A. Yes, sir.

Q. And after you brought this suit, this present action, I declined to defend this case for the insurance company on account of my former connection with it until you addressed to me a letter and told me you had no objections to my doing so; that is true, isn't it? A. Yes, sir."

(3) That after the introduction of all the testimony and before the submission of the cause to the jury, Mr. Holt, attorney for the defendant, moved the Court for a peremptory instruction to the jury to find a verdict in its favor with respect to the attorneys' fees and the costs in the Superior Court, for the reason that there could be no recovery therefor on account of the failure to give notice within ten days, on the theory that this notice applied as well to the defense of the suit as to the payment of the loss arising from the liability, which motion was denied and defendant was allowed an exception. [46]

(4) After the Court had instructed the jury, and before they had returned a verdict in the cause, defendant duly and regularly excepted to the charge of the Court, which instructed the jury that they might return a verdict in favor of plaintiff for the costs incurred by him in defending the suit of Merrill against him in the Superior Court of Pierce County.

H. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON,
Attorneys for Defendant. [47]

Plaintiff's Exhibit "A—Policy."

Case No. 1739–C.

United States District Court, Western District of Washington.

JOHN B. STEVENS & CO.,

vs.

FRANKFORT MARINE & A. CO.

No. W131817. Limits $5,000—$10,000.00.

Established 1865.

THE FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY, OF FRANKFORT ON THE MAIN, GERMANY.

United States Department.

100 William St., New York, N. Y.

C. H. FRANKLIN,

Manager & Attorney.

EMPLOYER'S LIABILITY POLICY.

IN CONSIDERATION of the Warranties hereinafter contained and set forth on the back of this Policy, and which the Assured makes and warrants to be true by the acceptance of this Policy, excepting the statements concerning the number of employees and their compensation, which are estimated, and of the payment of SEVENTY-THREE and 00/100 DOLLARS ($73.00) Estimated Premium, THE FRANKFORT, MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY, of FRANKFORT-ON-THE-MAIN, GERMANY (hereinafter called the "Company").

DOES HEREBY AGREE TO INDEMNIFY John B. Stevens Co. of Tacoma, County of Pierce, State of Washington (herein called the "Assured"), for the term of one year beginning on the 17th day of November, 1908, at noon, and ending on the 17th day of November, 1909, at noon, Standard time, at the place where this policy has been countersigned.

AGAINST LOSS arising from legal liability for

damages on account of bodily injury or death suffered by any employee or employees of the Assured resulting from any and every accident of whatsoever nature or cause happening in, upon, or about the premises and in the business of the Assured as described on the back hereof; but the liability of the Company in respect to any one employee suffering injury or death shall in no case exceed the sum of FIVE THOUSAND DOLLARS ($5,000.00), nor, subject to this limit, shall the total liability of the Company in respect to any one accident resulting in injury to, or the death of, several employees, in any event exceed the sum of TEN THOUSAND DOLLARS ($10,000.00). [48]

IT IS EXPRESSLY WARRANTED AND AGREED

1. That the Company's liability for accidents caused by or happening about any elevator plant, or caused by the explosion, rupture or collapse of any steam boiler or boilers, is limited to such elevator plant and boilers as are enumerated and described on the back hereof.

2. That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the Assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of accident under Liability Insurance Policies by any special law of the State in which the policy is issued, give notice in writing of such accident to the Company, addressed to the Manager for the United States, at the office of the Company in New York, N. Y., or to the duly authorized representative

for the locality in which this policy is issued. If thereafter the Assured shall receive notice of any claim arising out of an accident duly reported to the Company as before provided, or of any legal proceedings to enforce such claim, he shall, within three days, give notice thereof to the Company in like manner, and shall forward to the Company every summons and process as soon as the same shall have been served on him.

3. That if any legal proceedings are taken to enforce a claim against the Assured, which would be covered by this policy if the Assured were legally liable in respect to such claim, the Company shall, at its own cost, undertake the defense or settlement of such legal proceedings in the name and on behalf of the Assured, and shall have entire control of such defense, whether legal liability on the part of the Assured in respect to the claim is proven as the result of such proceedings or not. If the Company shall at any time offer to pay to the Assured the full amount for which the Company might be liable to indemnify the Assured in respect to the claim sought to be enforced, it shall not thereafter be bound to defend any legal proceedings nor be liable for any costs or expenses which the Assured may incur in defending the same; but the Company shall not be responsible for any damages alleged to have been sustained by the Assured in consequence of any action or omission of the Company in connection with such claim or proceeding. The Assured shall, at all times, under the direction of the Company, render all reasonable and necessary assistance to enable the

Company to effect settlements or to properly conduct a defense or to prosecute an appeal, or to secure information or the attendance of witnesses.

4. That the Company may undertake at its own cost the settlement of any claim duly reported to it as before provided, and the Assured shall not, except at his own cost, settle any claim nor incur any expense without the consent of the Company thereto previously given in writing, nor admit any liability on account of the accident; provided, however, that at the time of the accident, such immediate surgical relief to the injured may be furnished as may be imperative, and reasonable expenses thus incurred shall be deemed a part of the liability of the Company, if claimed, and if doctors' bills for such [49] actual immediate surgical relief are presented to the Company within six months from the date of the accident.

5. That this policy may be cancelled at any time by written notice, served on or sent by registered letter to the Assured at the address given herein, stating the date when the cancellation shall be effective, which shall be subsequent to the date of the notice. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company it shall retain a pro rata premium; if cancelled by the Assured, the Company shall, after deducting twenty-five per centum of the whole of the premium for expenses, retain a premium computed according to the customary short rates. (In either case the earned premium shall be computed on the pay-roll for the year, as indicated by the payroll of the As-

sured during the time the policy shall have been in force.) In any case the Company shall receive or retain the minimum premium stated in Clause 6. The Company's check, mailed to the address of the assured as given herein, shall be a sufficient tender, but no return premium shall be payable until a statement of the actual pay-roll of the Assured during the time this policy was in force shall have been furnished to the Company by the Assured.

6. That the premium is based upon the estimated annual pay-roll to be expended by the Assured during the term of this policy. A sworn statement of the actual pay-roll expended by the Assured during the policy period shall be furnished to the Company within thirty days after the expiration of the policy, and this policy shall not cover the liability of the Assured for accidents to any employee whose wages are not included in the estimated pay-roll and in the sworn statement of the actual pay-roll expended. If the pay-roll shall exceed the estimate, the Assured shall pay the Company the additional premium earned within thirty days after the amount shall have been determined, and notice given as Assured. If the actual pay-roll shall be less than the estimate, the Company will return the unearned premium, when determined; provided, however, that the premium to be retained by the Company shall in no event be less than the sum of FIFTY DOLLARS, *dollars,* or the premium for which this policy is issued, if less than Twenty-five Dollars.

7. That the Company shall have the right at all reasonable times to examine the books of the Assured

so far as they relate to the wages paid to employees; and the Assured shall, when so requested, and within ten days of the date of the request, furnish the Company with a sworn statement of the total amount of wages paid to his employees during any period within the term of this policy which may be specified by the Company.

8. That this policy shall not cover any liability which the Assured has assumed, may now or hereafter assume, by contract or otherwise, for loss on account of bodily injuries, fatal or non-fatal, to any employee or employees, except by consent of the Company, evidenced by the endorsement hereon of such consent, signed by the Manager and Attorney for the United States.

9. That if the Assured has any other policy in this Company, in respect of an injury, fatal or non-fatal, covered [50] hereby, the Assured shall elect the policy under which the accident shall be treated; but the Company shall not be held responsible for a liability under more than one policy.

10. That this policy covers the making of such repairs, renovations and alterations as are necessary to maintain the premises, plant, machinery and appliances in good order and safe working condition, but alterations and additions of a structural character are not covered by this policy without the previous consent of the Company obtained thereto in writing.

11. That this policy shall not apply to or cover any injury suffered by any person, young person or child employed by the Assured contrary to law, nor

to any child under fourteen years of age where no statute restricts the age of employment, nor to any injury suffered by others caused by the act of any such person, young person or child employed by the Assured contrary to law.

12. That any assignment of interest under this policy be void, unless the written consent of the Company is endorsed hereon by the United States Manager.

13. That if the Assured carry the policy of another insurer, whether valid or not, against a claim covered by this policy, he shall not be entitled to recover a larger proportion of the loss than the sum hereby insured bears to the whole amount of insurance applicable to such claim.

14. That in case of loss under this policy, the Company shall be subrogated to all claims or rights of the Assured in respect to such loss against any person or persons, and the Assured shall execute any and all papers required to secure to the Company such rights.

15. That an agent has no authority to change this policy or to waive any of its provisions, nor shall notice to any agent, or his knowledge or that of any other person, be held to effect a waiver or change in this contract or in any part of it. No change whatever in this policy nor waiver of any of its provisions shall be valid unless an endorsement is added hereto, signed by the United States Manager of the Company, expressing such waiver or change.

16. That no action shall lie against the Company recover for any loss under this policy unless it shall

be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within ninety (90) days after final judgment against the Assured has been so paid and satisfied. The Company does not prejudice by this condition any defenses against such action that it may be entitled to make under this policy, and the special agreements and warranties herein contained shall be construed as conditions precedent to the payment of any loss under this policy.

17. "That this policy shall not cover loss arising from a liability occasioned in whole or in part by the failure of [51] the Assured to comply with the provisions of any labor or factory law or other statute in force during the term of this policy, and providing for the protection of employees; nor any loss arising from liability occasioned by the violation by the Assured of any legal ordinance."

IN WITNESS WHEREOF, THE FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY, of Frankfort-on-the-Main, Germany, has caused these presents to be signed by its United States Manager and Attorney, but the same shall not be binding upon the Company until countersigned by a duly authorized and commissioned Agent.

C. H. FRANKLIN,
Manager and Attorney for the United States.

Countersigned at Tacoma, Washington, this 17th day of November, 1908.

W. H. OPIE & CO.,
Authorized and Commissioned Agent. [52]

Order No.....
State Order No.....
Agency at Tacoma, Wash.....
New Policy No. W131817.....
Old Policy No.....
Estimated.
Pay-roll, $10,000, Rate 73¢.....
PREMIUM $73.00.....
Commence Nov. 17th, 1908.....
Expire Nov. 17th, 1909.....
Term twelve Months.....
Expir. Exp. Bordereau El. Reg.....

THE FRANKFORT, MARINE, ACCIDENT AND PLATE GLASS INSURANCE CO., of Frankfort-on-the-Main, Germany.

United States Department.

100 William St., New York, N. Y.

C. H. FRANKLIN, Manager.

APPLICATION is hereby made for EMPLOYEES' LIABILITY POLICY of Insurance to indemnify the assured against loss not exceeding $——— in respect to any one Employee in any case nor, subject to this limit, $——— in respect of any Accident wherein several Employees may be involved.

SCHEDULE OF WARRANTIES.

1. Name and Full Address: John B. Stevens Co., West Waterway, Tacoma, Wash.
2. Business is Hay, Straw and Feed Dealers and the operations are those usual thereto excepting ———

3. No motive power is used excepting Electricity for Baling Hay.
4. Explosives or Chemicals are not used, excepting—None.
5. No power presses are used for stamping metal work, excepting—None.
6. There are ONE Boilers of UPRIGHT type; age ——— years. Insured in ——— Company. Policy expires ————, 19——.
7. There are ——— Elevators ——— Pass'gr ——— Freight. [53]
   Maker ——— insured in ——— Company. Policy expires ————, 19——.
8. Employers' Liability Insurance is carried in NONE Company for $——— each Employee. Policy expires ———, 19——.
9. No Company has cancelled or refused to issue liability or boiler insurance to the assured during the past three years, except as follows: None.
10. No Company has insured this risk during the past two years, except as follows: None.
11. Estimated Pay-roll during term of Policy for all employees EXCLUSIVE of offices and office employees is $10,000.00, and the amount actually paid during preceding 12 months was $———.

12. SCHEDULE OF EMPLOYEES AND PREMISES OF EMPLOYER.

Description of Employment.	Estimated number.	Estimated Annual Payroll.	Premium Rate per $100 of Compensation.	Place where Shops, Factories or Yards are Situated.
Handling hay, straw and feed				
Bailing hay and warehouse work	12	10,000	73¢	
Employees on hand-fed stamping, punching, cutting and embossing machine—No				
Drivers and drivers' helpers—No				
Sub-contractors and Employees—No				

Complete and accurate pay-roll records will be kept corresponding to the classifications above described. [54]

We agree to pay Seventy-three Dollars ($73.00) premium on delivery of the Policy, which is to take effect at 12 o'clock noon the 17th day of Nov., 1908, and is to terminate on the 17th day of November, 1908, at 12 o'clock noon Standard Time, at the place where the policy has been countersigned.

Dated November 17th, 1908, at Tacoma, Washington.

JOHN B. STEVENS & CO.,
W. H. MOORE, Secy.,
Applicant.
Sub-Agent or Broker,

_____.

General Agent,
W. H. OPIE & Co. [55]

ASSIGNMENT OF INTEREST BY ASSURED.

The interest of ——— covered by this policy is hereby assigned to ——— subject to the consent of the FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY.

Dated at ———, this —— day of ———, 19——.

———,

(Signature of the Assured.)

Wages estimated for term from ———, 19——, to ———, 19——, $———.

Wages expended for term from ———, 19——, to ———, 19——, $———.

Balance ——— $———.

It being understood and agreed that $——— is the estimated wage expenditure for the remainder of the term of this policy, viz.: from ———, 19——, to ———, 19——, and the said assignee agreeing to an adjustment as per condition 6 of this policy the FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY, of Frankfort-on-the-Main, Germany, hereby consents that the interest of ——— covered by this policy be assigned to ———.

Dated at New York, N. Y., this —— day of ———, 19——.

———,

United States Manager and Attorney.

RECEIVED of THE FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY, of Frankfort-on-the-Main, Germany, ——— dollars Return Premium, in consideration of

which this Policy is hereby cancelled and surrendered to Company.

_____,

Assured. [56]

No. W131817.

EMPLOYER'S LIABILITY POLICY

OF

THE FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY of Frankfort-on-the-Main, Germany.

UNITED STATES DEPARTMENT:

TRUSTEES:

Richard Delafield, Pres't of National Park Bank.
Ernst Thalmann, of Ladenburn Thalmann & Co.
Stuyvesant Fish, Pres't of Illinois Central Railroad.

C. H. FRANKLIN,
Manager and Attorney.
100 William Street,
New York, N. Y.

ISSUED to JOHN B. STEVENS CO., Tacoma, Washington.

Estimated Pay-roll—$10,000.00.
Premium—$73.00.
Expires November 17th, 1909.

READ YOUR POLICY.

INSURANCE, REAL ESTATE AND LOAN.
W. H. OPIE & CO.,
306 Equitable Bldg.,
Tacoma, Wash. [57]

[Endorsed]: "Filed U. S. District Court, Western District of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." **[58]**

Plaintiff's Exhibit "B."

Case No. 1739—C.

United States District Court, Western District of Washington.

JOHN B. STEVENS & CO.,

vs.

FRANKFORT MARINE ACCIDENT & C. CO.

COPY OF LETTER RECD. FROM FITCH & JACOBS.

Oct. 19, 1909.

John B. Stevens & Co.,
Tacoma, Washington.

Gentlemen:

We represent Mr. I. D. Merrill who was injured on or about July 19th, at your feed mill and warehouse, while in your employ, and thru your negligence.

If you desire to take this matter up with us before action is brought, please do so on or before the 23rd of this month.

Yours truly,
Signed by FITCH & JACOBS.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[59]**

Plaintiff's Exhibit "C."

Case No. 1739—C.

United States District Court, Western District of Washington.

JOHN B. STEVENS & CO.,

vs.

FRANKFORT MARINE ACC. etc. CO.

JOHN B. STEVENS & CO. No. 1006.

Hay, Grain and Flour.

Tacoma, Wash., Jan. 19, 1911.

Pay to Hudson & Holt ——— or order $6539.30 Sixty-five Hundred thirty-nine and ——— 30/100 Dollars.

JOHN B. STEVENS & CO.

W. H. MOORE, Cashier.

To National Bank of Commerce,
Tacoma, Washington.

(Endorsed):

"Pay Fitch & Jacobs, attorneys
for I. B. Merrill, or order.
HUDSON & HOLT.
FITCH & JACOBS,
Attys. for I. S. Merrill."

(Perforated): "PAID
: 1 : 20 : 11: "

(Endorsed for filing): "Filed U. S. District Court, Western District of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [60]

"Plaintiff's Exhibit "D."

Case No. 1739—C.

United States District Court, Western District of Washington.

JOHN B. STEVENS & CO.,

vs.

FRANKFORT MARINE, ACCIDENT ETC. CO.

In the Superior Court of the State of Washington, for the County of Pierce.

ABSTRACT OF JUDGMENT.

No. 28904.

I. B. MERRILL,

Plaintiff,

vs.

JOHN B. STEVENS & Co.,

Defendant.

Judgment Debtor, JOHN B. STEVENS & CO., and from E. J. McNEELEY and JOHN SNYDER, as sureties.

Judgment Creditor I. B. MERRILL.

Judgment with interest at 6 per cent, per annum from Feb. 10, 1910, and costs....$6100.00 DR.

Int. 347.20

Attorney's Fee.. .....

Plaintiff's Costs—Clerk's Fee, $———; Service Fee $———

Supreme Court Costs..... 46.50

Witness Fee, $———; Attorney's Fee, $———; Misc. Fee $———.
Total, $———.

Superior Court Costs..... .... 45.60

[61]

Defendant's Costs—Clerk's Fee, $———; Service, $———; Witness Fee, $———; Attorney's Fee, $———; Misc. Fee, $———; Total, ———.

Judgment entered Dept. 2, Journal 131, page 172, Jan. 20, 1911.

FITCH & JACOBS,
Attorneys for Judgment Creditor.

SUPPLEMENTAL PROCEEDINGS.

Date 1911.

Jan. 20. Received sum of $6539.30 in full satisfaction of above judgment, costs & interest.

FITCH & JACOBS,
Attys. for Plaintiff.

1912.

Dec. 31. Abstract Judgment issued..... .70

State of Washington,
County of Pierce,—ss.

I, E. F. McKENZIE, County Clerk and ex-officio Clerk of the Superior Court of the State of Washington, in and for Pierce County, do hereby certify that the within and foregoing is a full, true and correct Abstract of Judgment in the within entitled action as the same appears of record in my office in Execution Docket, vol. 26, at page 228.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Superior Court, this 31 day of Dec., 1912.

[Superior Court Seal] E. F. McKENZIE,
Clerk.
By M. E. McNerthney,
Deputy Clerk. [62]

"SATISFIED.
Jan. 20, 1911.
E. F. McKENZIE, Clerk.
By M. E. McNerthney, Deputy." [63]

No. 28904.

ABSTRACT OF JUDGMENT.

IN THE

SUPERIOR COURT
HOLDING TERMS AT
TACOMA, WASH.

I. B. MERRILL,
Plaintiff,

vs.

JOHN B. STEVENS, et al.,
Defendant, [64]

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [65]

Order Settling Bill of Exceptions.

This cause having come on before the Court on this 3d day of January, 1913, for the settling of a bill of

exceptions and the time for the settling and certifying thereof having been duly extended by order of the Court, and stipulation of the parties until and including this day, and the parties having agreed together with respect to the defendant's proposed amendments, and said amendments having been allowed; and the Court finding that the parties have agreed to said bill of exceptions, and that the same is a full, true and correct bill of exceptions, now, therefore, on motion of L. B. da Ponte and R. S. Holt, attorneys for the plaintiff and defendant, it is ordered that the said proposed bill of exceptions, as amended, together with the exhibits in the case to be attached thereto by the clerk, be and is hereby settled and allowed as the true bill of exceptions in this cause, and that the same be now certified accordingly by the undersigned, the Judge of this court who presided at the trial of this cause, and when so certified that this bill of exceptions be filed by the clerk.

Dated January 3d, 1913.

EDWARD E. CUSHMAN,
Judge.

O. K.—R. S. HOLT.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 7, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [66]

[Plaintiff's] Assignment of Errors.

Comes now the plaintiff in error and makes the following assignment of the errors on which it will rely on its writ of error in this cause, viz.:

I.

The Court erred in the ruling on defendant's motion for judgment on the pleadings in holding that there could be no recovery on the policy for the loss sustained by the judgment in the Merrill case.

II.

The Court erred in excluding the testimony sought to be elicited from the witness, Stevens, as follows:

Q. "State whether or not you had any notice or knowledge of that accident or that it was claimed to have occurred on your premises until you got that letter."

A. "No, sir."

Mr. HOLT.—"I object and move that the answer may be stricken as incompetent and immaterial."

The COURT.—"The answer may be stricken."

Mr. da PONTE.—"The plaintiff excepts and expects to prove by the witness that this letter of Fitch & Jacobs is the first knowledge that he or any other officer of the plaintiff company had of this accident."

III.

The Court erred in holding and ruling that the costs of the appeal of the Merrill case were no part of the costs of defending the accident case and could not be recovered. [67]

IV.

The Court erred in rejecting plaintiff's offer of proof as follows:

Mr. da PONTE.—"I now offer to prove by this witness the facts with respect to the happening of this accident, and that the plaintiff had no notice

of it, and that the defendant in any case was not prejudiced by not having notice sooner; that all of the witnesses were available at the time that notice was given to defendant of the accident."

V.

The Court erred in rejecting the following offer of proof, viz.:

Mr. QUICK.—"The plaintiff now offers to prove by the witness, W. H. Moore, that he was secretary of the John B. Stevens Company at the time Mr. Merrill was injured and for several months thereafter, and in charge of the office of the company and the business of the company as transacted at the office, and that he did not know anything about the alleged injury or claim that Mr. Merrill had been injured until the time of receiving the letter of notification from attorneys, Fitch & Jacobs, which has been referred to by the witness, Stevens."

VI.

The Court erred in his charge to the jury as follows, viz.:

"You are instructed that under the law, as the Court has settled it, you cannot return a verdict for more than $286.40, because there has been no proof under the issues that the Court has allowed to go to the jury of any damage on account of the breach for any greater amount than that."

VII.

The Court erred in his charge in refusing to sub-

mit the cause to the jury on the issues made by the pleadings.

J. W. QUICK,
L. B. da PONTE,
Attorneys for Plaintiff. [68]

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [69]

Petition of Plaintiff for Writ of Error.

The plaintiff, John B. Stevens & Company, feeling aggrieved by the judgment entered herein, petitions the Court for an order allowing it to prosecute *it to prosecute* a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that an order be made fixing the amount of security which plaintiff shall give upon said writ of error, and that the judgment be stayed pending the determination of said writ.

Petitioner presents herewith an assignment of the errors upon which it will rely in said court of appeals.

J. W. QUICK,
L. B. da PONTE,
Attorneys for Plaintiff.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [70]

Order Allowing Plaintiff Writ of Error.

The petition for a writ of error and assignment of errors being filed and presented, it is ordered that a writ of error be allowed to have the final judgment herein reviewed in the Honorable Circuit Court of Appeals of the United States for the Ninth Circuit. The amount of security on said writ of error is hereby fixed in the sum of $500.00, and upon giving said bond said writ will issue.

Dated the 8th day of February, 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [71]

Error Bond [of Plaintiff].

Know all men by these presents that we, John B. Stevens & Company, as principal, and the other subscribers hereto, as sureties, are held and firmly bound unto the Frankfort Marine, Accident & Plate Glass Insurance Company, in the sum of Five Hundred ($500.00) Dollars, for which we bind ourselves, our heirs, administrators, successors and assigns.

The condition of this bond is such that whereas said John B. Stevens & Company has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in this cause on the 4th day of January, 1913; now, therefore,

If said John B. Stevens & Company shall prosecute its said writ of error with effect and answer all costs and damages that may be awarded against it if it shall fail to make good its plea, then this obligation to be void; otherwise to be in force and effect.

Dated Feb. 8, 1913.

JOHN B. STEVENS & COMPANY.
By JNO. B. STEVENS, Pres't.
JNO. B. STEVENS,
L. B. da PONTE,
Sureties.

Approved this 8th day of Feb., 1913.

EDWARD E. CUSHMAN,
Dis. Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [72]

[Defendant's] Assignment of Errors.

Comes now The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant in the above-entitled action, and plaintiff in error in this proceeding, and in connection with its petition for a writ of error herein makes the following assignment of errors on which it will rely and which it will urge on the prosecution of said writ of error in the above-entitled action, which errors occurred at the trial of said case, to wit:

I.

That the District Court of the United States for the Western District of Washington on the trial of

the said cause erred in admitting in evidence proof of the payment by John B. Stevens & Company, a corporation, defendant in said action, of an attorney's fee in the defense of the case of I. B. Merrill against it. That the testimony was objected to on the ground that it was irrelevant and immaterial because there could be no recovery therefor; it was excepted to and the exception was allowed.

II.

That the said Court erred in this, to wit: That after all of the testimony in the case had been introduced and before its submission to the jury, the defendant moved the Court for a peremptory instruction to the jury to find a verdict in its favor with respect to the attorney's fees and costs paid by the defendant, John B. Stevens & Company, a corporation, in the Superior Court of Pierce County, Washington, in the case [73] of I. B. Merrill against said defendant, for the reason that there could be no recovery therefor on account of the failure of the said defendant to give notice of the accident within ten (10) days, as required by the policy of insurance, and that the motion was denied, and thereupon the defendant, The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, excepted to the overruling and denying of the said motion.

III.

That the Court erred in instructing the jury as follows:

"Counsel have conceded in court that the expenses in the superior court that plaintiff was occasioned by defending this suit was $260.00 and

for certain witnesses, twelve in number, and the plaintiff would be entitled to recover for its liability to pay those witnesses two dollars a day for the time they attended on the court, and ten cents a mile for the distance they had to travel, which the plaintiff does not claim was more than two miles, one mile going and one coming. Counsel have also conceded that they do not claim more than one day for the witnesses. $26.40 is the amount for the witnesses, and $260.00 for attorneys and court costs, which would make $286.40 expense that the plaintiff was put to in defending the case after it claims that the defendant refused to defend for it."

That after the Court had so instructed the jury and before they had returned a verdict, defendant duly and regularly excepted to the charge and instruction aforesaid, which informed the jury that they might return a verdict in favor of the plaintiff for the costs incurred by it in defending the suit of Merrill against it in the Superior Court of Pierce County, Washington.

IV.

That the Court erred in overruling and denying defendant's motion for judgment notwithstanding the verdict, the said motion being based on the theory that the failure to [74] give notice of the accident within ten days after its occurrence, deprived the plaintiff of any benefits under the policy, including the right to have the action brought by Merrill against the plaintiff defended by the defendant. An exception was duly and regularly taken and allowed to the denial of the motion for judgment notwith-

standing the verdict.

Wherefore the said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant, prays that said judgment of the District Court of the United States for the Western District of Washington may be reversed and that an order may be entered directing a judgment in its favor in said action on the errors herein assigned.

R. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON,
Attorneys for The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Defendant.

Service by a true copy hereof admitted this 27th day of February, 1913.

L. B. da PONTE,
J. W. QUICK,
Attorneys for John B. Stevens & Company, Defendant in Error.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [75]

Petition of Defendant for Writ of Error.

Comes now The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant in the above-entitled action, and says that on or about the 4th day of January, 1913, this Court entered judgment herein in favor of the plaintiff and against this defendant, and that a motion for judg-

ment *non obstante veredicto* was duly filed in said cause by this defendant within the time allowed by law, which was overruled on the 6th day of February, 1913, that in the judgment and proceedings had prior thereto and in overruling the said motion for judgment *non obstante veredicto* certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error issue in its behalf out of the United States Court of Appeals for the Ninth Circuit for a correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

R. S. HOLT.
U. E. HARMON,
HUDSON, HOLT & HARMON,
Attorneys for Defendant.

Service of the foregoing Petition for Writ of Error admitted and a true copy thereof received this 27th day of February, 1913.

J. W. QUICK,
L. B. da PONTE,
Attorneys for Plaintiff. [76]

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [77]

Order Allowing Defendant Writ of Error.

This 27th day of February, 1913, came the defendant and plaintiff in error. The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, and with it presented an Assignment of Errors intended to be urged by it; praying, also, that a transcript of the records, proceedings and papers on which the judgment herein was rendered, duly authenticated, may be sent to the Circuit Court of Appeals, for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may appear proper in the premises.

On consideration whereof the Court does allow the writ of error upon the defendant and plaintiff in error giving bond according to law in the sum of $600.00 which shall operate as a supersedeas bond.

EDWARD E. CUSHMAN,
District Judge of the United States for the Western District of Washington, Southern Division, Before Whom said Cause was Heard.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [78]

Bond of Defendant on Writ of Error.

KNOW ALL *EMN* BY THESE PRESENT: That we, The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, Plaintiff

in Error, as principal, and ROYAL INDEMNITY COMPANY, a corporation organized under the laws of the State of New York, and authorized to act as surety on judicial bonds by the Attorney General of the United States, as surety, are held and firmly bound unto the defendant in error, John B. Stevens & Company, a corporation, in the full and just sum of SIX HUNDRED DOLLARS, to be paid to the said defendant in error, his attorneys, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seal*d* and dated this 25 day of February, 1913.

Whereas, lately at a District Court of the United States for the Western District of Washington, Southern Division, in a suit pending in said court between John B. Stevens & Company, a corporation, plaintiff, and The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant, a judgment was rendered against said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, and the said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, having obtained a writ of error and filed a copy thereof in the clerk's office of the court to reverse the judgment in the aforesaid suit and a citation directed to the said John B. Stevens & Company, a corporation, citing and admonishing him to be and appear at [79] a session of the United States Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of Cali-

fornia, in said Circuit, on the 29 day of March, 1913, next.

Now, the condition of the above obligation is such that if the said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,

By E. A. STROUT & CO.,
Agents.

ROYAL INDEMNITY COMPANY,
(R. I. Co. Seal)

By ALBERT KOCH,
Attorney in Fact.

Attest: R. P. OLDHAM,
Attorney in Fact.

Signed, sealed and delivered in the presence of:

_____.

Approved:

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [80]

Certificate of Clerk U. S. District Court to Record, etc.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, in pursuance of the command of the Writ of Error herein, herewith transmit a true and correct copy of all proceedings and the record in the case of John B. Stevens & Company, plaintiff and plaintiff in error, versus The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant and defendant in error, lately pending in the United States District Court for the Western District of Washington, under my hand and the seal of said Court.

And I hereby attach and *herewith* original Writs of Error and original Citations of the respective parties herein.

And I do further certify that the cost of preparing and certifying said transcript of the record amounted to the sum of $32.30, which amount has been paid to me by the attorneys in said case.

ATTEST my official signature and the seal of this Court this sixth day of March, A. D. 1913.

[Seal] FRANK L. CROSBY,
Clerk. [81]

[Endorsed]: No. 2255. United States Circuit Court of Appeals for the Ninth Circuit. John B. Stevens & Company, a Corporation, Plaintiff in Er-

ror, vs. The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Defendant in Error, and The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Plaintiff in Error, vs. John B. Stevens & Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writs of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed March 14, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time Under Rule 16.]

In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit.

JOHN B. STEVENS & COMPANY,
Plaintiff in Error,

vs.

FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,
Defendant in Error.

Now, on motion of L. B. Da Ponte, attorney for plaintiff, and good cause appearing therefor,—

IT IS NOW ORDERED that the time within which the return on the Writ of Error sued out herein by John B. Stevens & Company may be made,

be and the same is hereby extended to and including the 29th day of March, A. D. 1913.

Dated March 7th, 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 2255. In the Circuit Court of Appeals of the United States for the Western District of Washington, Ninth Judicial Circuit. John B. Stevens & Company, Plaintiff in Error, vs. Frankfort Marine etc. Ins. Co., Defendant in Error. Order Extending Time on Writ of Error of John B. Stevens & Co. Filed Mar. 14, 1913. F. D. Monckton, Clerk.

[Writ of Error of John B. Stevens & Co.]

In the District Court of the United States for the Western District of Washington, Southern Division.

JOHN B. STEVENS & COMPANY

vs.

FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,

The President of the United States, to the Honorable Judges of the United States District Court for the Western District of Washington, Southern Division, Greeting:

Because in the record and rendition of the judgment in said court before you, in a cause wherein John B. Stevens & Company is plaintiff and Frankfort Marine, Accident & Plate Glass Insurance Com-

pany is defendant, manifest error hath happened to the injury of said plaintiff, and we being willing that *said should* be corrected and justice done to said plaintiff, do command you, under your seal, to send the records and proceedings aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, in thirty days from the date of this writ, in order that said Court of Appeals may correct said error, as of right ought to be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 8 day of February, 1913.

EDWARD E. CUSHMAN,
U. S. District Judge.

[Seal] FRANK L. CROSBY,
Clerk U. S. D. C., West. Dist. Wash.
By E. C. Ellington,
Deputy Clerk U. S. District Court, Western District of Washington.

[Endorsed]: No. 2255. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Error. Filed Mar. 14, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Citation on Writ of Error of John B. Stevens & Co.]

In the District Court of the United States for the Western District of Washington, Southern Division.

JOHN B. STEVENS & COMPANY

vs.

FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,

The President of the United States of America, to Frankfort Marine, Accident & Plate Glass Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at the United *States Court* of Appeals for the Ninth Circuit at the courtroom of said court in San Francisco, California, within thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, in a cause wherein John B. Stevens & Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned be not corrected and speedy justice done to the parties.

Witness the Hon. EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 8 day of February, 1913.

EDWARD E. CUSHMAN,
U. S. District Judge.

Due service of the within citation is admitted this 8 day of Feb., 1913.

R. S. HOLT and
U. E. HARMON,
Atty. for Deft. in Error.

[Endorsed]: No. 2255. United States Circuit Court of Appeals for the Ninth Circuit. Citation on Writ of Error. Filed Mar. 14, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Writ of Error of Frankfort Marine, Accident and Plate Glass Insurance Company.]

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between John D. Stevens & Company, a corporation, the defendant in error, and The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, the plaintiff in error, a manifest error hath happened to the damage of the said plaintiff in error, as by its answer appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be herein given, that then under your seal, distinctly and openly, you send the records and proceedings

aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at San Francisco, California, in said circuit, on the 29th day of March, 1913, next in the said Circuit Court of Appeals, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 27 day of February, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington, Southern Division.

By E. C. Ellington,
Deputy.

Service of the within and foregoing ——— by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 27 day of Feb., 1913.

J. W. QUICK,
L. B. da PONTE.

[Endorsed]: No. 2255. In the United States Circuit Court of Appeals, Ninth Circuit. The Frankfort Marine, Accident & Plate Glass Insurance

Company, a Corporation, Pltff. in Error, vs. John B. Stevens & Company, a Corporation, Deft. in Error. Writ of Error. Filed Mar. 14, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit.

[Citation on Writ of Error of Frankfort Marine, Accident and Plate Glass Insurance Company.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,

Defendant in Error.

The United States of America.

The President of the United States of America to John B. Stevens & Company, a Corporation, Defendant in Error, Greeting:

You are cited and admonished to be and appear in the United *States Court* of Appeals for the Ninth Circuit at the courtroom of said court in the city of San Francisco, in the State of California, within thirty (30) days after the date of this citation, to wit: On the 29th day of March, 1913, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein The Frankfort Marine, Accident & Plate Glass Insurance

Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness EDWARD D. WHITE, Chief Justice of the United States, the 27th day of February, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] EDWARD E. CUSHMAN,
Judge of the District Court of the United States for the Western District of Washington, Southern Division.

Service of the within and foregoing Citation and Writ of Error therein mentioned and receipt of true copies thereof are hereby admitted this 27 day of February, 1913.

J. W. QUICK,
L. B. da PONTE,
Attorneys for John B. Stevens & Company, a Corporation, Defendant in Error.

[Endorsed]: No. 2255. In the United States Circuit Court of Appeals, Ninth Circuit. The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Plaintiff in Error, vs. John B. Stevens & Company, a Corporation, Defendant in Error. Citation. Filed Mar. 14, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

No._____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN B. STEVENS & COMPANY,
Plaintiff in Error,
vs.
FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,
Defendant in Error,
AND
THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,
Plaintiff in Error,
vs.
JOHN B. STEVENS & COMPANY,
Defendant in Error,

Brief for John B. Stevens & Company

STATEMENT OF THE CASE.

This is an action on a policy of employer's liability insurance.

The amended complaint (R., p. 5) alleges the execution of the policy covering the period between Novembr 17, 1908, and Novmbr 17, 1909, indem-

nifying plaintiff in error against loss arising from legal liability for damages on account of bodily injury or death suffered by any employee from accidental causes, not to exceed the sum of $5,000, in addition to the cost of defending an action to recover therefor.

While the policy was in force one I. B. Merrill, an employee, was injured, and on October 28th, 1909, commenced an action to recover damages therefor. Plaintiff immediately sent the summons and complaint to the insurance company with the request that it care for the same, as provided by the policy, but defendant refused to do so, and plaintiff was forced to defend the action at its own cost and incurred an expense of $1072.95. The Merrill action resulted in a judgment against plaintiff in error for $6,100, which was affirmed by the Supreme Court of the state, and was paid off and discharged, together with interest and costs, by plaintiff in error.

The allegations of the complaint are admitted except in one particular, the defendant pleading that the policy required the assured, upon the occurrence on an accident, to give immediate notice thereof, and that said I. B. Merrill was injured on or about the 15th of June, 1909, "*and that the plaintiff well knew that he had received the said injuries, but that, notwithstanding such knowledge* * * did not give notice of the said injury or the accident from which it arose * * * until the latter part of October or the first part of November following" * * * and further, "that by reason of the failure of plaintiff to give notice, and its failure to investigate the

accident, and to preserve the testimony, *the evidence became destroyed and the witnesses scattered, and at the time the action referred to in plaintiff's complaint was brought, by reason of the neglect of the plaintiff to properly attend to the matter and by reason of certain changes and alterations that it had made in the structure at which the accident occurred, it was no longer possible successfully to defend the said action.*" (R., 14-15-16.)

To this answer plaintiff in error replied, denying that it knew of the accident when it occurred on or about the 15th of June, but admitted that it gave no notice until the 19th of October, "and alleges that it had no notice or knowledge of the accident or injury to the said I. B. Merrill until the 19th or 20th of October, 1909, and immediately on learning thereof and on the said 19th or 20th of October, 1909, it gave due notice to defendant." * * * (R., 18-19.)

Plaintiff in error also denied that the defendant had been in any way prejudiced by its failure to get notice of the accident sooner.

The pleadings being in this state, counsel for plaintiff made his opening statement to the jury. The opening statement follows the pleadings, going a little more into detail. With reference to the accident, counsel stated:

> "In June or July of 1909 Mr. Merrill, an employee, was injured while, as he claimed, stepping across from the platform of the warehouse to a car loaded with grain, for the purpose of shutting off the grain from the car as it ran

into the hopper. He alleges that he stepped on the hopper from the platform, and that it broke and precipitated him to the ground, through which he received a severe injury. But he did not realize at that time that he was seriously hurt, and continued to work from the time of the accident, whether in June or July, until the latter part of August, at which time he left and went to the hospital, and it was found he had dislocated or broken a kidney, and he was forced to undergo an operation and the kidney was removed. Then about the 19th of October he employed counsel to represent him in his claim, and they served notice or a letter, upon Mr. Stevens, notifying him that Mr. Merrill was injured while in their service and employ and through their negligence." (Rec., 29-30.)

"We have pleaded as an excuse why that notice was not given that the accident to Merrill was not known to have occurred. We will expect to show that neither Mr. Stevens nor Mr. Moore knew anything about any accident until they received the notice from Fitch & Jacobs, attorneys for Merrill, which was served on them October 19th, several months after the accident, and that as soon as they learned of the accident they notified the insurance company." (Rec., 31-32.)

Upon the issue of prejudice to the defendant it was stated that all the witnesses to the accident were present at the trial, except one, and he had left be-

fore the trial but after notice was given the insurance company, and with respect to the alteration in the structure it is shown that it was slight and immaterial and was made before assured knew that the hopper was said by Merrill to have figured in his accident, and further, in any event, the whole factory was destroyed by fire before the case was or could have been tried, so that the hopper would not have been available for use in evidence in any case. (Rec., 32-33.)

At the conclusion of this statement counsel for defendant moved for a judgment on the opening statement (Rec., 34), on the ground, solely, that:

> "It was stated that notice was not given because the assured did not know of it, and I desire to present the question that knowledge on the part of the assured cuts no figure."

This motion was argued at length and the court announced his opinion, sustaining the same so far as plaintiff's claim to recover any part of the judgment in the Merrill case was concerned, but overruling the motion as to the costs of the litigation, holding that the failure to give notice was not a condition precedent to the right to recover the costs. (Rec., 34-35.)

The case then proceeded and was confined to the costs of the trial in the lower court, the costs of appeal being also eliminated as no part of the costs of defending the action. (Rec., pp. 37-38.)

Appropriate offers of proof were made, but all of the evidence was excluded. (Rec., 37-40.)

Defendant offered no testimony. The court instructed the jury that no recovery could be had for more than the costs of defending the Merrill action in the trial court, which were agreed by counsel to be $286.40 (Rec., 41-42-43), and a verdict was returned in that amount accordingly.

Plaintiff sued out this writ of error to review the rulings of the District Court with respect to its right to recover the amount paid in satisfaction of the Merrill judgment and costs of appeal, and the defendant appealed from that part of the judgment allowing recovery of the costs incurred in the lower court. The writs of error have been consolidated and will be heard together.

ASSIGNMENTS OF ERROR.

I.

The Court erred in ruling on defendant's motion for judgment on the pleadings in holding that there could be no recovery on the policy for the loss sustained by the judgment in the Merrill case.

II.

The Court erred in excluding the testimony sought to be elicited from the witness, Stevens, as follows:

> Q. "State whether or not you had any notice or knowledge of that accident or that it was claimed to have occurred on your premises until you got that letter."
>
> A. "No, sir."

Mr. HOLT.—"I object and move that the answer may be stricken as incompetent and immaterial."

The COURT. — "The answer may be stricken."

Mr. da PONTE.—"The plaintiff excepts and expects to prove by the witness that this letter of Fitch & Jacobs is the first knowledge that he or any other officer of the plaintiff company had of this accident."

III.

The Court erred in holding and ruling that the costs of the appeal of the Merrill case were no part of the costs of defending the accident case and could not be recovered.

IV.

Th Court erred in rejecting plaintiff's offer of proof as follows:

Mr. da PONTE.—"I now offer to prove by this witness the facts with respect to the happening of this accident, and that the plaintiff had no notice of it, and that the defendant in any case was not prejudiced by not having notice sooner; that all of the witnesses were available at the time that notice was given to defendant of the accident."

V.

The Court erred in rejecting the following offer of proof, viz.:

Mr. QUICK.—"The plaintiff now offers to prove by the witness, W. H. Moore, that he was secretary of the John B. Stevens Company at the time Mr. Merrill was injured and for several months thereafter, and in charge of the office of the company and the business of the company as transacted at the office, and that he did not know anything about the alleged injury or claim that Mr. Merrill had been injured until the time of receiving the letter of notification from attorneys Fitch & Jacobs, which has been referred to by the witness, Stevens."

VI.

The Court erred in his charge to the jury as follows:

"You are instructed that under the law, as the Court has settled it, you cannot return a verdict for more than $286.40, because there has been no proof under the issues that the Court has allowed to go to the jury of any damage on account of the breach for any greater amount than that."

VII.

The Court erred in his charge in refusing to submit the case to the jury on the issues made by the pleadings.

POINTS AND AUTHORITIES.

FIRST POINT.

The clause of the policy in question is not to be construed literally and as requiring immediate notice in any event, but should be construed to mean that notice must be given within a reasonable time under the circumstances, taking into consideration the knowledge which the assured had or did not have of the accident, as well as the effect which the lack of such notice had on the rights of the insurer, as to whether it was prejudiced by not having notice sooner.

All of these matters were questions of fact which should have been submitted for the determination of the jury under appropriate instructions.

The "joker" in the policy is as follows:

> "2. That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of an accident under liability insurance policies by any special law of the state in which the policy is issued, give notice in writing of such acicdent to the company, addressed," etc.

When it is recollected that the offers of proof and opening statement of counsel showed that the assured was in total ignorance of the accident until the letter from Fitch & Jacobs, dated October 19th, 1909 (Rec., p. 59), was received, and that it was

also shown that the company was in no way prejudiced by the want of notice sooner, we need do no more than refer to the recent decision of this court in the case of *Empire State Surety Company vs. Northwest Lumber Company*, No. 2184, Feb. 24th, 1913, not yet reported. In justice to the learned district court it should be added that this decision had not been rendered when this case was tried.

But the clause in question is even less susceptible of the literal construction placed on it than the one construed in the case cited. After stipulating for "immediate" notice and notice "within ten days," it is then, in the same sentence, provided that notice within the time required by any state law shall be sufficient. It is thus apparent that the company did not regard immediate notice or notice within ten days as of controlling importance, because they were perfectly willing to execute the contract under the terms as to notice which might be provided by the laws of the several states in which they do business. In view of this, how can counsel have the hardihood to contend that either "immediate" notice, or notice "within ten days," was a *sine qua non*, but for which the policy would not have been delivered? We submit that by the very terms of the clause in question the harsh and literal meaning now sought to be given the policy is wholly inadmissible.

Another consideration militating against the construction now sought to be imposed on the policy is deducible from its express provisions. The policy indemnifies assured against accidents to its employees "*happening in, upon or about the premises*

and in the business of the assured, as described on the back hereof." (Rec., 46-47.)

By Part 6 it is provided that the policy shall not cover accidents to employees whose wages are not included in the estimated payroll and in the sworn statement of the actual payroll expended. (Rec., p. 50.)

Part 17 provides that the policy shall not cover an accident resulting from failure of assured to comply with the provisions of any factory law, nor from a violation of any legal ordinance.

The notice required by Part 2 must, of course, be limited to such accidents as are covered by the policy, viz., accidents happening "in, upon or about the premises of assured and in its business," and not excepted by the clauses referred to. Therefore, before assured was under obligation to give any notice at all it must have been contemplated that he would know of the accident and of the details thereof sufficiently to be able to determine whether it was one of which he was required and expected to give notice. It seems to us, therefore, that, taking the policy as a whole, assured was not expected or required to give notice whether he had it to give or not. Upon this feature the following case is in point:

> *Aetna Indemnity Co. vs. Crowe*, 154 F. 545 (CCA8C).

A policy indemnified insured against "fraudulent or dishonest acts of the employee amounting to embezzlement or larceny," and required immediate notice of any fraudulent or dishonest act of the em-

ployee which might involve a loss under the policy. The employee committed an embezzlement and an action was brought on the policy. The defense was that the notice required was not given. It appeared that the employee's books were checked and many very suspicious circumstances were discovered, but no notice was given until it became certain that an embezzlement had occurred. The court holds on the authority of

American Surety Co. vs. Pauly, 170 U. S. 133, that no notice need be given until insured had knowledge that an "embezzlement" had been committed — in other words, of a loss for which the insurer would be liable, saying:

> "In *American Surety Co. vs. Pauly* the Supreme Court, in considering the knowledge required to move an employer to give a notice like that required in this case, approved an instruction given by the trial court in the following words:
>
> 'And in considering this issue you are to inquire, first, when it was that the plaintiff became satisfied that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularities. He may have had suspicions of fraud. *But he was not bound to act until he had acquired knowledge of some specific or dishonest act which might involve the defendant in liability for misconduct.*' "

It would seem true to say, therefore, that we have the very highest authority for saying that assured was not expected to give notice of an accident until he had knowledge thereof, and of the particulars sufficiently to advise him that a loss had occurred which would render the insurer liable under its policy.

Still another consideration repelling the construction adopted in the lower court is deducible from the language in clause 2. It requires notice to be given "whether any claim be made in respect thereof or not," but it does not provide that notice shall be given "whether assured knows of the accident or not." Had it so provided, a manifest solecism would exist. Such a provision would be absurd. It would require what is manifestly impossible of fulfillment. That such requirements in contracts are void is elementary law. Yet the construction defendant contends for would make the policy require an impossibility. The court will not lightly presume, in the absence of compelling words, that the parties intended to stipulate for the performance of an impossibility for no other purpose than to effect a forfeiture and enable the company to escape its solemn obligation. On this feature the language of this court in the case of the Northwest Lumber Company is pertinent:

> "It is self evident that a party cannot give notice of an accident in respect of which a claim can be made until he himself is informed of it or has knowledge concerning it, and he could not

be expected to do so. *The clause (F) alluded to does not require that he shall give the notice whether he has such knowledge or information or not.*"

The contention we make is supported by a practical unanimity of authority, including the Supreme Court of the United States.

Fid. & Dep. Co. vs. Courtney, 186 U. S. 342.
American Surety Co. vs. Pauly, 170 U. S. 133.

The first case cited was an action on a good conduct bond which required immediate notice of a default. It was held that notice given by assured within a reasonable time after knowledge of the default satisfied the requirement of the policy, and the case of *Ward vs. Maryland Casualty Company*, 51 Atl. 900 (N. H.), is cited and quoted from with approval. The Ward case involved the construction of a policy of liability insurance such as we have in the case at bar, so that the Supreme Court has made it plain that no distinction in principle exists between the two kinds of policies.

In *Mandell vs. Fid. & Cas. Co.*, 49 N. E. 110 (Mass.), approved by this court in the Northwest Lumber Company's case, the following language occurs:

"The requirement (of immediate notice) must be so construed that an effectual notice could be given in every instance."

Germania Ins. Co. vs. Boykin, 12 Wall., 20 L. Ed. 442:

A requirement of proof and notice of loss under a fire policy is dispensed with where insured was insane and unable to give the notice.

Edgefield Mfg. Co. vs. Maryland Cas. Co., 58 S. E. 969 (S. C.):

Where the manager of insured was ill at the time of the accident and unable to give notice and shortly afterwards died and a temporary successor learned of the casualty policy a month later and then gave notice, it was in time and satisfied a requirement in the policy for "immediate notice."

Counsel may seek to distinguish these cases because the particular "joker" here involved provides that the notice must not be given later than ten days. This is a mere juggling with words in no way affecting the principle involved. It only means that notice may be given within ten days after insured learned of the accident. It is an express provision that notice given within ten days after assured learned of the accident would be sufficient. Here we gave notice the same day we learned of the accident.

Woodmen's Ac. Ass'n vs. Byers, 87 N. W. 546.

A policy required notice to insurer within ten days after the accident. The insured was made insane by the injury. Notice was given by insured's wife, who accidentally discovered the policy more than thirty days after the accident. Held in time as the requirement for notice within ten days would be construed to mean *within ten days after knowledge*

of the accident by the beneficiary. See this case for an extensive review of the authorities.

Phillips vs. U. S. Ben. Soc., 79 N. W. 1 (Mich.).

A policy provided for immediate notice of the accident, and if notice was not given within five days from the happening of the accident the claim would be invalid. Held that *notice within five days after insured knew he had been injured by the accident was in time.*

In this case the physician attributed the illness to rheumatism or neuralgia, but subsequent examination by other physicians showed the injury was due to an accident occurring two months before assured was taken ill. The notice was held in time.

In view of the well settled rule that where a policy is susceptible of two constructions that one most favorable to the assured and which will save a forfeiture will be adopted *(Imperial Fire Ins. Co. vs. Coos*, 151 U. S. 38, L. Ed. 231; *London As. Co. vs. Companie, etc.*, 167 U. S. 42, L. Ed. 113), it would seem too clear for contradiction that the construction contended for by the company is wholly inadmissible. As observed by the Supreme Court of Washington in a similar case, it must be presumed that the company intended, when it executed the policy and accepted insured's money, to issue a contract which would be available for the protection of assured in every proper case, and to give such a construction as would defeat this expectation would be equivalent to saying that the company had obtained money "under false pretenses." *(Sheard vs. U. S.*

F. & G. Co., 58 W. 29.) Going a little more into details than is disclosed by the offers of proof, suppose that when the matter is fully developed the following state of facts be made to appear, viz.:

One Merrill was working for J. B. Stevens & Company at its wholesale grain and feed warehouse. In the latter part of August, 1909, he asks for a leave of absence, saying he is ill. His foreman grants the leave requested. On his way from the warehouse he meets his employer, John B. Stevens, and the following conversation occurs: "Q. Where are you going, Merrill? A. I am going to the hospital. Q. What is the matter with you? A. I don't know what's the matter. I am going to the hospital to find out." He goes accordingly. Nothing more is heard from him, but his wages are paid while he is being treated at the hospital for some weeks, and finally, on the 19th day of October, 1909, a letter is received from Fitch & Jacobs, his attorneys, advising that Merrill met with an accident while in assured's employ. This being the first and only knowledge of the accident that assured had, and in fact, the injured man, himself, being wholly unaware of his own accident, having remained at work for more than thirty days after he claimed to have met with his accident. Under these circumstances, we submit, no court can hold that assured was in default for not giving notice sooner than it did, and plaintiff in error was entitled to go to the jury on the issue whether the notice was given in a reasonable time, under all the circumstances of the case.

Counsl for defendant in error himself fully realized that it was necessary to show knowledge on the part of assured, for he has expressly pleaded that assured had such knowledge of the accident when it occurred. This plea is wholly inconsistent with his present attitude. Defendant in error having itself raised this issue in its answer, it seems to us it should now be estopped from contending that it was a wholly immaterial one.

SECOND POINT.

Whether notice was given in time or not is immaterial unless the company was prejudiced by not having notice sooner.

Regardless of the question of notice, we submit that the company cannot escape its liability unless it can show substantial prejudice by reason of lack of notice. The defendant in error has again tacitly admitted this proposition because it affirmatively pleads prejudice for want of notice. It has itself raised the issue in its answer and having done so is estopped from pretending that such issue is an immaterial one.

But in the case of the Northwest Lumber Company this court has held that prejudice must be shown in order to make available the provision for notice, saying:

> "On the other hand, it does not appear that the surety company has been prejudiced in its rights by reason of any delay in being informed or notified of the accident, and it is altogether probable that justice had been done in the premises."

Frank Parmelee Co. vs. Aetna L. Ins. Co., 166 F. 741 (CCA):

This was an action on an employer's liability policy. The company contended that it had not been served with the papers in the action within the time provided for by the policy. The court say:

> "*In contracts of this kind, to escape liability,*

the insurer must show that the breach is something more than a mere technical departure from the letter of the bond — that it is a departure that results in substantial prejudice and injury to its position in the matter."

In the case at bar we have met and denied the allegation of prejudice. We have shown that at the time notice of the accident was given the company every single witness was available, and all but one actually testified at the trial, and the testimony of the missing one can be shown to be merely cumulative of what was testified to by many others. But be that as it may, he was available when notice was given, and that is sufficient. As to the alteration in the structure, it appears that the same was immaterial, was made before anyone even knew Merrill claimed to have been injured on the hopper, and lastly, the whole warehouse was destroyed by fire and hence the structure could not have been used in evidence in any event. This amounts to an absolute demonstration that no prejudice accrued to the insurance company for want of notice sooner, and leads inevitably to the conclusion that it is dishonestly seeking to avoid a just obligation upon the merest technicality, is attempting to place an unfair and dishonest construction on its own language, and one it well knows was never contemplated either by itself or the assured when the policy was executed. The result is that assurd, being forbidden himself to settle the accident, was obliged to take the chances of a lawsuit and has suffered a loss of $7,000, and

is much worse off than if he had not had a policy of so-called "indemnification," for without it he might have settled the claim for a trifling sum.

But whatever may be the rule as to prejudice under the decisions generally, it is alleged in the answer and admitted in the reply that the contract of insurance was made in Washington. Therefore, it is governed by the laws of Washington.

Eq. L. Ins. Co. vs. Pettus, 140 U. S. 226.
Barry vs. Indemnity Co., 46 Fed. 441, followed in 50 Fed. 511.
Insurance Co. vs. Robinson, 582-88.

It has long been well settled law in this state that a compensated surety cannot avoid its contract for a mere technical breach of the bond. Substantial prejudice must be shown, as held in the Parmelee case, *supra.*

Beebe vs. Redward, 35 Wash. 615.
Ovington vs. Aetna Indemnity Co., 36 Wash. 473.
United States vs. Aetna Indemnity Co., 40 W. 87.

And the burden of pleading and proving prejudice is on the surety.

U. S. vs. Aetna Indemnity Co., supra.

And see also the case of *Sheard vs. U. S. F. & G. Co.*, 58 W. 29, for an extended discussion of the principles of construction of contracts of compensated sureties adopted and enforced in this state.

Within the rule of the Sheard case, and the cases cited, it is too plain for successful contradiction that in this state a compensated surety must show prejudice, and such prejudice will never be presumed.

So that we submit that, regardless of the question of notice, a showing of prejudice was a prerequisite to the escape of defendant in error from its solemn obligation.

THIRD POINT.

Plaintiff in error was entitled to recover the costs of appeal as well as the costs of the trial court.

The policy provides in Part 3:

> "That if any legal proceedings are taken to enforce a claim against the assured * * * the company shall, at its own cost, undertake the defense or settlement of such legal proceedings in the name and on behalf of the insured, and shall have entire control of such defense" * * *
>
> Under this clause it was the obligation of the company to have assumed the defense of this action in all of its phases. Due notice was given and the company is bound by what was done by the assured in good faith to the same extent as if it had in fact assumed the discharge of its obligation.

Washington Gas Co. vs. District of Columbia, 161 U. S. 316:

The gas company allowed a hole in the sidewalk to remain open. The city was sued and paid a judgment for personal injuries to a pedestrian by falling in the hole. In an action by the city against the company it was held:

> "When a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the de-

fense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantage of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not."

Defendant in error having repudiated its liability, it was incumbent upon assured to shift for himself, and he was in fairness bound to exhaust his legal remedies. Acting on the advice of counsel (who, by the way, is also the insurance company's attorney), the case was appealed and these costs incurred. Had the appeal been successful it would have inured to the benefit of the insurr, and under these circumstances it is undoubtedly contemplated by the policy that the insurance company would be liable for all costs incurred.

The policy does not limit the costs to a defense in the trial court, and the language used, to say the least, is susceptible of the construction we contend for. If so, the doubt must be resolved in favor of assured.

Imperial Fire Ins. Co. vs. Coos, 36 L. Ed. 231.

So far as the appeal of the insurance company is concerned, we will only say thta the policy clearly contains separable provisions and obligations, as pointed out by the lower court. The obligation to defend was not made to depend upon the giving of notice of the accident. The judgment of the district court seems right as far as it went. But plaintiff in error should in addition have been allowed the costs of the appeal and the amount paid on the judgment.

We respectfully pray that the judgment appealed from be reversed.

Respectfully submitted,

J. W. QUICK,
L. B. DA PONTE,
Attorneys for John B. Stevens & Company.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN B. STEVENS & COMPANY, a corporation,
Plaintiff in Error,
vs.
THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a corporation,
Defendant in Error,
AND
THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a corporation,
Plaintiff in Error,
vs.
JOHN B. STEVENS & COMPANY, a corporation,
Defendant in Error.

No.

Brief for the Frankfort Marine, Accident & Plate Glass Insurance Company

ANSWER TO CERTAIN PARTS OF THE BRIEF OF PLAINTIFF IN ERROR, JOHN B. STEVENS & COMPANY.

We deem it proper at the commencement of our brief to call the attention of the court to certain statements contained in the brief of plaintiff in

error, although the argument contained in the brief will be answered at another point in this brief.

On page 4 of the brief of plaintiff in error it is stated that one I. B. Merrill was injured and on October 28, 1909, commenced an action, and that plaintiff in error immediately sent the summons and complaint to the insurance company, and on the same page, in undertaking to state the substance and effect of the pleadings, plaintiff in error endeavors to make it appear that the allegation with reference to the time when Merrill was injured was in the answer in this case. We consider this part of the brief evasive. As a matter of fact, it was alleged in the complaint in this case that Merrill was injured on July 19, 1909 (Transcript of Record, p. 6).

It is also stated on page 4 of this brief that the allegations of the complaint in this case were admitted, with one exception. This is entirely incorrect. The amended complaint set forth the insurance policy as Exhibit "B" and paragraph 1 of the answer to this complaint denied the allegations of paragraph 3. This answer also denied, in paragraph 2, that Merrill was injured on July 19th. In paragraph 5 of the amended complaint it was alleged that immediate notice of the accident was given to the defendant in error. This allegation, as well as other allegations contained in paragraph 5, was denied. Paragraph 6 alleged that plaintiff

in error performed each and every thing required of it by the contract. This was denied by the answer (Transcript of Record, pp. 5, 6, 12, 13 and 14).

On page 7 of the brief of plaintiff in error it is stated that the motion of defendant in error for judgment on the opening statement was sustained in part and overruled in part. This is not correct. The motion was denied *in toto* (Transcript of Record, p. 35). As shown by the record at pages 35 and 36, the court announced that it would exclude evidence of a lack of knowledge of the accident on the part of plaintiff in error, and thereupon the case proceeded and plaintiff in error offered all the evidence which it deemed necessary to make out its case, and the evidence as to a lack of knowledge and as to the costs incurred on the appeal of the case to the Supreme Court, was excluded (Transcript of Record, pp. 36, 37, 38, 44 and 45). There was no limit placed on the right of plaintiff in error to make out its case by proper evidence, but the particular evidence referred to was excluded by the court.

On page 12 of the brief of plaintiff in error is found a statement to the effect that the policy stipulated for "immediate notice" and in the same sentence is the statement that the policy provided that notice "within the time required by any state law shall be sufficient." This is a very inaccurate statement. The exact language of the policy is this:

"That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of accidents under LIABILITY INSURANCE POLICIES by any special law of the state in which the policy is issued, give notice in writing, etc." We suppose the idea of counsel in using the word "immediate" was to make the case appear similar to the recent decision of this court in the Empire State Surety Company case, referred to on the same page of the brief.

It was alleged in the answer that the policy was issued in the state of Washington and this fact was admitted in the reply. The purpose of the pleader in making this allegation was to so frame the issue that the court could take judicial knowledge of the existence or non-existence of any special law of the state of Washington. Of course, there is no special law in the state of Washington regulating the time within which notice of accidents must be given, under liability insurance policies.

The very disingenuous argument of counsel, that because the policy provided that notice might be given within the time required by any special law of the state in which it was issued, it appeared that the company did not intend to stand on the ten-day clause, is hardly worthy of an answer. A provision in the policy in conflict with a special law of the

state in which the policy was issued would not be valid and this was the reason for inserting that clause in the policy.

On page 16 of the brief of plaintiff in error is found the statement "that the Ward case involved the construction of a policy of insurance such as we have in the case at bar." This is an incorrect statement. The policy in that case required "immediate notice" and we judge from that part of the opinion found at the bottom of page 516, 93 Am. St. Rpts., that it required the giving of "immediate notice with full particulars." The report of the case does not show whether it was a policy indemnifying against liability, or whether it indemnified against loss from liability. This difference would determine whether the condition was a condition precedent or a condition subsequent. We will point out this more fully later in our brief.

On page 19 of the brief of plaintiff in error is found a supposititious statement of the facts in this case, which has the striking characteristic of being entirely and utterly untrue, and while we recognize the impropriety of indulging in statements of this kind, we will state the supposed facts in this case. Suppose that Merrill falls on one of the plank constituting the side of the hopper and that within a few moments the foreman is informed of the circumstances; that Merrill works a short time and then goes to the hospital, in charge of the foreman,

where he has an operation resulting in the removal of his kidney. Suppose that during the time he is in the hospital the hopper is remodeled and the plank on the side where he fell are knocked off and thrown away, and suppose that afterwards he brings suit and alleges that one of these plank, not being securely nailed, split off from the side of the hopper and caused him to fall, and suppose that when notice of the accident was given to the insurance company, not only is the plank in question off the hopper, but the hopper itself has been enlarged so that the plank which Merrill claims broke off is no longer there; suppose that the wife of Merrill goes regularly to the office of plaintiff in error to receive his wages while he is in the hospital and that the foreman tells Merrill that the wages will be paid because they do not want any suit or trouble about the case.

In answer to the statement of plaintiff in error as to the facts, we submit these facts to the court for their consideration in the same manner and to the same extent that the statement of plaintiff in error is entitled to.

On page 20 of the brief of plaintiff in error is found the statement that defendant in error realized that it was necessary for it to show knowledge on the part of plaintiff in error, because it plead it. This was plead as an affirmative defense, but we do not see what bearing this proposition has on the question now before the court. The case was not

tried on this issue and it is very doubtful whether any evidence would have been offered in support of this affirmative defense if the court had held that plaintiff in error was not required to give the notice until within ten days after it had knowledge of the accident. On the other hand, plaintiff in error alleged in its complaint that it gave "immediate notice," and the policy itself set forth as an exhibit to the complaint contained the requirement that notice must be given within ten days, and by the denials in the answer of defendant in error the issue was raised whether the notice was given in ten days. It was optional with defendant in error when it came to making its defense, to prove knowledge or to stand on the ruling of the court requiring it. We think no more need be said on this subject.

On page 21 of the brief of plaintiff in error it is stated that defendant in error tacitly admitted that it was necessary to show prejudice by pleading prejudice and that, having raised the issue, it is estopped from pretending that the issue is an immaterial one.

It is a new proposition to us that by pleading an affirmative defense, which in no way admits the allegations of the plaintiff's complaint, and which relates to a matter collateral thereto, plaintiff in error was relieved from making out his case.

The position of plaintiff in error on this question is that when we plead prejudice in our affirmative

defense, we tacitly stated to the court that unless we were prejudiced plaintiff was entitled to recover. This is a new proposition in pleading and practice and we think it needs no answer.

ARGUMENT.

The policy in question is an EMPLOYERS' LIABILITY POLICY undertaking to indemnify "against *loss* from legal liability for damages on account of bodily injury or death" (Transcript of Record, p. 46).

It contains the agreement "that upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately and, at the latest, within ten days, give notice in writing of such accident" (Transcript of Record, p. 47).

The policy contains the further provision that the special agreements contained in it shall be construed as conditions precedent (Transcript of Record, p. 53).

There are two other provisions in the policy relating to a subsidiary question, to which we will refer the court later.

All the authorities, with the exception of one case, hold that no rights accrue to the assured under a policy of this exact character until there has been a loss by him arising from the payment of a judgment

rendered against him, as required by the terms of the policy.

All the cases hold, we believe, without exception, that a condition requiring notice of the accident, in policies where the contract is to indemnify against *loss* arising from liability for damages, is a condition precedent.

It was conceded in this case that the accident occurred in June or July and that no notice was given until in the latter part of the October following. It was claimed by plaintiff in error that it did not know of the accident until in October and that it then gave notice within ten days after it acquired this knowledge.

It was contended in the court below, that the condition requiring the giving of notice should be construed by the court to read: "That upon the occurrence of an accident the assured shall immediately, and at the latest within ten days after acquiring knowledge of the accident, give notice in writing," instead of "That upon the occurrence of an accident the assured shall immediately, and at the latest within ten days, give notice in writing of the accident."

The primary question is, under such a provision, Does ignorance of the occurrence of an accident excuse a failure by the assured to give the notice within ten days after its happening?

The question involves established elementary rules only.

Will the court enforce, *as it is written*, a condition in a contract which, plain in its meaning and explicit in its terms, is not only in its nature a condition precedent, but is made one by the express provisions of the contract?

Will the court violate fundamental rules governing the interpretation and enforcement of contracts, and, *by construction*, make a new contract for the parties and refuse to enforce the one made by them?

Will it do this in the instance of a condition precedent, where the only claim of ambiguity or uncertainty in the provision in question is, that if taken literally it is harsh and exacting and in a sense unreasonable?

If a condition precedent is harsh and exacting, or even unreasonable, does this afford a justification for the assertion, as a matter of law, that the terms of the condition are ambiguous or uncertain?

Is there any rule of law for the interpretation of contracts which recognizes the idea that if parties enter into a contract containing a condition precedent which is harsh, exacting or unreasonable, such a condition will, by reason thereof, become ambigu-

ous and open to construction or that the court will refuse to enforce it if it is unreasonable?

Would not such a rule be based, of necessity, on one or the other of the two conceptions, that parties do not intentionally make contracts which are harsh, exacting or unreasonable and that, therefore, some other meaning must be given to the words which impart to them this character, or that the law does not recognize and enforce such contracts when they are made?

Are not such conceptions contrary to the spirit and letter of our law?

The whole case is stated in the foregoing propositions and they are elementary in character. In addition we will say, the answer to each of them is plainly suggested by its mere statement.

We cannot understand on what theory it is urged that a provision in policies of this kind, requiring notice of an accident, within ten days from its happening, is harsh, exacting or unreasonable, even if it does require notice to be given, before knowledge of the accident has come to the party charged with the duty of giving it. We do not understand on what theory a court would hesitate to give to a provision in a policy requiring such a notice, the meaning which plainly attaches to it and which can only be subtracted from it by a forced process of construction.

Parties to contracts assume various duties and obligations with reference to its subject matter, appropriate to their relation to it. This relation may be such as to properly impose on one of them the duty of ascertaining certain facts or acquiring certain knowlege and acting accordingly, as the basis of a right to enjoy the benefits of the contract.

Where knowledge, within a limited time, of the existence of certain facts, is essential to the preservation of the rights of one of the parties, the other party to the contract, with justice and propriety, may take upon himself the obligation of ascertaining the existence of these facts, and of imparting his knowledge of them, and it should not be regarded as an exacting or unreasonable provision, that imposes this duty on him, as a condition precedent.

The respective duties and obligations of the parties to contracts are usually assumed by those to whom, considering the character of the contract, they naturally and appropriately belong. Liability companies operate through agents who are usually remote from the companies they represent and more or less remote from the place where the business of the assured is conducted, who do not in any way exercise or assume to exercise, any supervision over the conduct of the business which is covered by the policy. The duty of supervising this business, and thus ascertaining the facts affecting the rights of

the insurer, stipulated in the contract, is rightfully imposed on and is appropriately assumed, by the assured himself.

The reasons for the requirement of prompt notice of an accident arising under an Employers' Liability Policy, are too evident to require any statement of them. If not, that which is contained in the suggestions of the courts on this subject is sufficient. It is properly said by the courts that this requirement is of the *essence* of the contract. Than this, no stronger statement, in a legal sense, can be suggested.

In the case of *Travelers' Ins. Co. vs. Myers, et al.*, 57 N. E. 458, the court, in speaking of the condition requiring notice, used this language:

"It is obvious that this stipulation is of the essence of the contract in insurance of this kind. It is not merely a stipulation as to the form of bringing to the notice of the insurer the fact of a loss as in policies of fire and life insurance. It is clearly a matter of substance in the contract, because the obligation of the insurer is not against the mere happening of an accident or an injury, but against 'loss from liability' to employees, who may be accidentally injured. * * * In a very little time the facts may, in a great measure, fade out of memory, or become distorted; witnesses may go beyond reach; physical conditions may change; and, more dangerous than all, fraud and cupidity may have had time to perfect their work. Therefore this stipulation is vital to the contract."

This decision and the reasoning contained in it are particularly applicable to this case where, according to the pleadings, not only did witnesses go beyond reach, but the physical conditions became changed before any notice was given of the accident.

It is not likely that an employer, exercising ordinary supervision over his employees and their labor, would fail to know when one of his employees had met with an accident in the course of his employment. Such a situation might possibly exist, but its improbability affords no reason for the supposition that it was not within the contemplation of the parties when the contract was made. Particularly is this true, in view of the comprehensive and unqualified language of the provision. In fact, the very improbability that an accident would happen without the assured promptly knowing of it, suggests that it would willingly take the chances of its so happening and assume to take precautions against it, and that by the language in question it intentionally did so. If notice of an accident is essential to the preservation of the rights of the insurer, it is not unreasonable to say, in effect, to the assured, "You must assume the duty of giving notice and consequently of ascertaining when your employees are injured and you must take the chances of an injury being sustained without your knowing of it, because in that case if someone must suffer it should not be the company which has no

means of ascertaining the fact, except through you."

Nothing is more common in contracts than for the respective parties to bind themselves absolutely and unqualifiedly to the performance of some act on their part as a condition on which depends their interest in the subject matter of the contract. It is a matter of common occurrence for parties to stipulate for the performance of such a condition, taking the chances of the existence or development of circumstances which may render it impossible for them to comply with it. A failure to comply with the condition is not excused by the happening of contingencies rendering performance impossible, even though they may have been unforeseen at the time the contract was made. The idea is, the courts do not make contracts for the parties and, if they do not for themselves, stipulate against contingencies which may render performance by them impossible, they must abide the consequences. It is in accord with this idea, that the courts enforce the rule that impossibility of the performance of a condition precedent, though it may arise from the act of God or public enemies, is no excuse, though the rule is different where there is a mere failure to perform some duty imposed by law.

It will be observed in this case that neither in the pleadings nor in the evidence which was offered, nor in its opening statement, did plaintiff in error,

John B. Stevens & Company, suggest any reason for the failure to learn of the accident, nor was any excuse for the failure to give the notice intimated, except the bare fact that plaintiff in error did not know of the accident, nor were any circumstances connected with the accident shown. It was not alleged, nor was any evidence offered to establish the fact, that plaintiff in error had shown any diligence in the premises, or that it even knew of the existence of the clause in the policy in question, *or that it would have given the notice even if it had known of the accident.*

We submit to the court this question: Is mere ignorance of the accident an excuse for a failure to give the notice within ten days, under the contention of plaintiff in error itself, unless it be also alleged, or shown, that notice would have been given within the time, if plaintiff in error had known of it?

By some oversight, although the complaint in the original case of *Merrill vs. John B. Stevens & Company*, is found on page 8 of the transcript of the record, the answer in that case is found on page 20, and some of the pleadings in the case at bar are printed between the complaint in the Merrill case and the answer in that case. We call the attention of the court to this fact to prevent confusion in the examination of the transcript.

It appears from the complaint in the Merrill case that it became necessary for him to have one of his kidneys removed, after the accident and before the beginning of his action. This defendant in error, while considering it entirely unnecessary to do so, deemed it not out of place to allege in its answer, as an affirmative defense, that the structure on which the accident occurred had been altered and repaired before notice of the accident was given to it, so that a defense of the action was impracticable (Transcript of Record, p. 14). Plaintiff in error replied to this by alleging that the repairs or alterations took place before it had received any notice of the accident (Transcript of Record, pp. 18-19). The injustice of the rule contended for by plaintiff in error in this case is clearly shown, for it is conceded by the pleadings in the case, that before the giving of any notice, plaintiff in error altered the structure on which the accident occurred. It is, of course, alleged in the reply, that before the trial of the case the structure was destroyed by fire, but it is only fair to presume that if seasonable notice of the accident had been given, the structure would have been photographed before any alterations had taken place, and the subsequent changes in it and its destruction by fire, would have been relatively unimportant.

We may say in this connection, that the answer in the case at bar imposed on plaintiff in error, the

obligation of proving a compliance with the condition requiring notice, regardless of the affirmative defense to which we have referred.

That the court may fully understand the exact character of the case we suggest that the opening statement of the attorney for plaintiff in error be carefully read.

See Transcript of Record, p. 29.

It is settled by an overwhelming weight of authority that under a policy containing the same language as the one involved in this case, no right accrues to the assured thereunder until there has been a loss by him, which loss is defined by the policy to be the payment of a judgment rendered against him on account of the liability referred to in the policy.

Ford vs. Aetna Life Ins. Co., 126 Pac. R. 69.

Allen vs. Gilman, McNeil & Co., 137 F. 136.

Conolly vs. Bolster, 72 N. E. 981.

Allen vs. Aetna Life Ins. Co., Garnishee, 145 F. 881.

Puget Sound Imp. Co. vs. Frankfort Etc. Ins. Co., 52 Wash. 124.

Burke vs. London Guaranty & Acc. Co., 92 N. Y. Supp. 652.

Cushman vs. Carbonado Fuel Co., 122 Ia. 656.

Sheard vs. United States Fidelity & Guar. Co., 58 Wash. 29.

Finley vs. United States Cas. Co., 113 Tenn. 597.

Frye vs. Bath, Gas & Elec. Co., 97 Me. 241.

Travelers Ins. Co. vs. Moses, 63 N. J. Equity 260.

Byers vs. International Aluminum Co., 101 N. Y. Supp. 83.

There is but one case holding a contrary doctrine and that is the case of *Sanders vs. Frankfort etc. Ins. Co.*, 57 Atl. 655, but the unsoundness of this case is pointed out in the opinion in the case of *Allen vs. Aetna Life Ins. Co., supra.*

In the policy involved in this case it is provided that the special agreements, of which the giving of notice is one, shall be conditions precedent.

We believe it is held by all the cases that a condition like the one in this case, requiring the giving of notice, is a *condition precedent* which must be performed before any liability exists on the part of the insurance company.

Employers Liability Assur. Corp. vs. Light, Heat & P. Co., 63 N. E. 54.

London Guarantee & Acc. Co. vs. Siwy, 66 N. E. 481.

Underwood Veneer Co. vs. London Guarantee & Acc. Co., 75 N. W. 996.

Green vs. Northwestern Live Stock Co., 54 N. W. 349.

California Sav. Bank vs. Am. Surety Co., 87 F. 118.

Ermentraut vs. Girard Fire & Marine Ins. Co., 65 N. W. 635.

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 746.

Travelers Ins. Co. vs. Myers, 57 N. E. 458.

Myers vs. Maryland Cas. Co., 101 S. W. 124.

McFarland vs. United States Mut. Acc. Ass'n., 27 S. W. 436.

11 Am. & Eng. Ann. Cases 253.

4 Cooley's Briefs Ins., p. 3570.

In the case of *Underwood Veneer Co. vs. London Guarantee & Acc. Co., supra*, the court distinguished and criticised the two cases of *Anoka Lbr. Co. vs. Fidelity etc. Co.*, 65 N. W. 353 and *Grand Rapids Elect. Light etc. Co. vs. Fidelity etc. Co.*, 69 N. W. 249, and used this language:

"After careful consideration, we are constrained to hold that the conditions indorsed upon the policy and quoted above were conditions precedent. * * True, there is no forfeiture clause in the contract. Nevertheless, the plaintiff, in order to maintain this action, was bound to perform such condition precedent."

We invite the attention of the court particularly to this case.

In the following cases the distinction between

conditions precedent and conditions subsequent in insurance policies, is aptly discussed:

Employers Liability Assur. Corp. vs. Light, Heat & P. Co., 63 N. E. 54.

Solomon vs. Cont. Fire Ins. Co., 55 N. E. 279.

California Sav. Bank vs. Am. Surety Co., 87 F. 118.

Travelers Ins. Co. vs. Myers, 57 N. E. 458.

McFarland vs. United States Mut. Acc. Ass'n., 27 S. W. 436.

"A well defined distinction exists between two classes of conditions found in insurance policies. Those which operate upon the parties prior to the loss are regarded as matters of substance, upon which the liability of the insurer depends, and are to receive a fair construction according to the intention of the parties, while, as to those prescribing formal requisites by which the previously vested right is made available, a rigid construction is not allowed." *Employers Liability Assur. Corp. vs. Light, Heat & P. Co.*, 63 N. E. 54.

In this case the words "a fair construction" are used in the sense of "a fair interpretation."

In the case just referred to, the policy indemnified against *liability* and it was held that the liability attached when the accident happened, and the condition requiring notice thereafter was a condition *subsequent* to be liberally construed.

"The condition requires that immediate written notice shall be given. The word 'immediate' cannot be construed literally, without, in many cases, causing a forfeiture. It is frequently impossible, under the circumstances of the accident or death, to give immediate notice. This *condition subsequent* must be liberally construed in favor of the beneficiary." *McFarland vs. United States Mut. Acc. Ass'n., supra.*

The case just referred to was an action on an accident policy and it refers to the case of *Tripp vs. Society*, 35 N. E. 316, which was also an accident case and a case where the condition was a condition subsequent.

We cannot undertake to review in detail all of the cases which may be cited as having some direct or indirect bearing on this case.

We have carefully examined and considered the cases which are cited in the brief of appellant in support of its position, as well as many other leading ones which might be cited in this case because they discuss and decide questions somewhat similar to the one here involved, and at the same time apply the rules more or less involved in the case at bar, to the facts involved in them.

From this examination we desire to say to the court that the decision in each case turned on the character of the policy in question; its conditions,

and the exact language of each. The conditions which were considered in the cases referred to, varied greatly in character and *no rule can be safely deduced from any of these cases without a careful consideration of the exact language, nature and character of the provisions involved.* In a number of these cases where *conditions subsequent* were under discussion, the court did not refer to them in these terms, but spoke of them as "conditions of this character." In one or two cases the courts seemed to ignore the distinction between the two classes of conditions, but the ambiguity in the provisions in question in them, made the distinction unimportant, because it rendered them subject to construction, even if they were conditions precedent.

The cases may be classified as follows:

1. Cases in which there was a loss by fire and the conditions under consideration were confessedly conditions subsequent.

These cases do not have sufficient bearing on the question to render it desirable to refer to them.

2. Cases arising on accident policies in which the condition was required to be performed after the happening of the accident which imposed a liability on the insurer and established a right in favor of the assured.

To cases of this kind the rules for the interpreta-

tion and construction of conditions subsequent, were applied.

Trippe vs. Provident Fund Society, 37 Am. St. R. 529.

Kenzler vs. American M. A. Ass'n., 43 Am. St. R. 934.

Rorick vs. Railway Officials' & Employers' Acc. Ass'n., 119 F. 63.

Mandell vs. Fidelity & Casualty Co., 49 N. E. 110-113.

3. Cases arising on policies of insurance against the sickness of animals.

The conditions of these policies were construed in accordance with the rules applicable to accident policies.

Green vs. Northwestern Live Stock Ins. Co., 54 N. W. 349.

Swain vs. Security Live Stock Co., 43 N. E. 105.

4. Cases arising on employers' liability policies in which the contract was to indemnify against *liability*, etc. The condition being one to be performed after the happening of the accident fixing the liability, a reasonable construction was adopted.

Employers' Liability Assur. Corp. vs. Light, Heat & P. Co., 63 N. E. 54.

London Guarantee & Acc. Co. vs. Siwy, 66 N. E. 481.

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 745.

A. Cases in which the contract was to indemnify against loss arising from liability.

Travelers Ins. Co. vs. Myers, 57 N. E. 458.

Columbia Paper Stock Co. vs. Fidelity & Casualty Co., 78 N. E. 320.

5. Cases where the condition, without regard to the character of the policy, required "immediate" notice, or notice "forthwith," of the accident.

In these cases it is held that the use of the words "immediate" or "forthwith" as terms denoting an interval of time, were ambiguous and that they were therefore subject to construction and that a reasonable construction would be put on them.

Fidelity & Deposit Co. vs. Courtney, 186 U. S. 342 (46 Law. Ed. 1193).

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 745.

Myers vs. Maryland Casualty Co., 101 S. W. 124.

Employers' Liability Assur. Corp. vs. Light, Heat & P. Co., supra.

London Guarantee & Accident Co. vs. Siwy, supra.

Travelers' Ins. Co. vs. Myers, 57 N. E. 458.

Phillips vs. U. S. Benefit Soc. of Saginaw, 79 N. W. 1.

Ward vs. Maryland Casualty Co., 51 Atl. 900.

6. Cases in which the policy of whatever kind, required notice to be given at once, or immediately, or within a fixed time, *with full particulars.*

In these cases it was held that the notice need not be given until there had been time and opportunity to obtain the particulars, and that a reasonable time, or the time fixed in the policy, should be allowed after such particulars had been obtained.

Trippe vs. Provident Fund Soc., supra.

Kenzler vs. Am. M. A. Ass'n., supra.

Foster vs. The Fidelity & Casualty Co. of N. Y., 99 Wis. 447.

7. Cases in which the language of the provision in question was qualified, limited or restricted by some other provision in the policy which made it subject to judicial construction.

Anoka Lumber Co. vs. Fidelity & Casualty Co., 65 N. W. 353.

Rorick vs. Railway Officials' & Employers' Acc. Ass'n., 119 F. 63.

Case at bar: Case in which the word "immediately" in the condition precedent in the policy is made certain by an express statement of the outside limit of time, the notice being required to be given "immediately and within ten days at the latest."

The following deductions must be drawn from

the decisions of the courts in the cases to which we have referred:

First: Where the notice is required to be given with full particulars after the happening of the event which fixes the liability, even in cases where the limit of time is definitely stated, a reasonable construction will be put on the contract, and where it does not provide that notice shall be given without regard to the question of knowledge on the part of the insurer, the provision will be construed to mean that notice shall be given within a reasonable time, or within the time fixed, after knowledge of the full particulars of the accident has come to the assured.

This latter proposition is particularly applicable to employers' liability policies.

Second: Where an employers' liability policy indemnifies against *liability*, the liability attaches at the time of the accident and the rule applicable to conditions subsequent is applied.

Third: Where the policy requires the giving of "immediate" notice, or notice "immediately," or "forthwith," or "at once," but fixes no limit of time, these words are held to be ambiguous or indefinite, as expressions of time, and the courts therefore construe them to mean within a reasonable time, having in view all of the circumstances

of the case, and it is held where such are the words expressed in the condition, that a reasonable time means a reasonable time after knowledge of the accident has come to the insured.

The courts merely say that it is unreasonable to require notice of that which is unknown to the party charged with giving it.

Fourth: Where the policy requires immediate notice with full particulars, or words which are the equivalent of these, the courts have construed the provision to mean that the notice need not be given until after the particulars have been obtained.

This rule applies to those provisions which are conditions precedent as well as to those which are conditions subsequent.

Fifth: Where the employers' liability policy undertakes to indemnify against *loss* arising from liability, the condition requiring the giving of notice of the accident is a condition precedent: is of the essence of the contract, and will be strictly construed according to its literal terms.

Sixth: Where in a case of a condition precedent, a limit of time is fixed within which the condition is to be performed, the contract will be enforced as it is written and a lack of knowledge of the accident on the part of the assured will not excuse the giving of the notice within the stipulated time.

In the case at bar there is not only a stipulated time but this time is established as a direct and literal qualification of the phrase requiring notice to be given "immediately." It is the legal antithesis of a case which merely requires the notice to be given "immediately."

There is no case which we have found where the language of the provision under consideration was at all like the one in the case at bar, which holds adversely to our position. There are several cases in which there was a limitation of the time within which the notice must be given, and they would be quite similar to the case at bar if it were not for the fact that in those cases the notice was required to be given with full particulars *after* the happening of the event which fixed the liability. This distinguishes them from the case at bar and the conditions received the liberal interpretation which is applied to conditions subsequent.

Trippe vs. Provident Fund Soc., supra.

Kenzler vs. American M. A. Ass'n., supra.

The following authorities affirm the proposition that in the case of a condition precedent where the notice is required to be given within a fixed time, the provision is strictly enforced and the notice must be given within that time, without regard to the question of the ability of the insured to do so, or to the question of his knowledge of the accident.

Gamble vs. Accident Assur. Co. Ir., Rep. 4 C. L. 204.

Patton vs. Employers' Liability Co., 20 L. R. Ir. 93.

Victorian Stevedoring etc. Co. vs. Australian Acc. Ins. etc. Co., 19 Victorian (Australia) 139.

Worsley vs. Woods, 6 T. R. 710.

Cassel vs. Lancashire etc. Co., 1 Times L. R. 495.

Ostrander on Insurance, Sec. 221.

Ermentraut vs. Girard Fire & Marine Ins. Co., 65 N. W. 635.

Columbia Paper Stock Co. vs. Fidelity & Casualty Co., 78 S. W. 320.

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 745.

Klein vs. N. Y. Life Ins. Co., 104 U. S. 88, 26 Law. Ed. 662.

Stoneham vs. Ocean R. & General Acci. Ins. Co., L. R. Q. B. Div. 237.

After reading some of the opinions dealing with the question of the giving of notice under insurance policies, and observing the ingenuity and dexterity employed by these courts to escape the conclusion which a proper regard for the fundamental rules of law should force on them, it is refreshing to read the clear and dignified opinion of a court not animated by a desire, to reach a

forced conclusion, such as the one in the case of *Victorian Stevedoring etc. Co. vs. Australian Acc. Ins. etc. Co.*, 19 Victorian, 139, where the following language is used:

"It was contended that the first part of the condition—that notice of any injury must be given to the insurance company within seven days of its occurrence—could not be regarded as a condition precedent because it was unreasonable to so read it. It was said that a man might be injured and might not be made aware of it for months after, and so could not give notice to the insurance company, and it would be a monstrous thing to hold that the policy was void because the insured had failed to give notice of something which he did not know. But it must be borne in mind that accident insurance policies contain many harsh conditions, which the insurers regard no doubt as indispensable, and those who accept such contracts on the basis of the conditions must accept the hardship as a part of the contracts. Although the circumstances might render it very hard or even absolutely impossible to give the notice required, still the insured entered into the contract and placed himself under that obligation, and must abide by it. Apart from such conditions the authorities show that this view is the one which the courts have adopted."

In the case of *Klein vs. N. Y. Ins. Co.*, 104 U. S. 88, 26 Law. Ed. 662, the wife failed to pay the premiums and plead her ignorance of the policy as an excuse. The court used this language:

"In policies of life insurance time is material and of the essence of the contract and non-payment at the day involves absolute forfeiture if such be

the terms of the contract. * * * In a contract of life insurance the insurer and the insured both take risks. The insurance company is bound to pay the entire insurance money even if the party whose life is insured dies the day after the execution of the policy and after the payment of but a single premium."

In the case of *Woolverton vs. Fidelity & Casualty Co., supra,* the indemnity was against *liability and* immediate notice was required to be given. In this case the court used this language:

"The duty imposed on the insured by his covenant is not passive, but active. Strictly construed, the insured would be bound to give notice immediately after the accident whether he knew of the occurrence or not. This, of course, would be a wholly unreasonable construction and must be rejected. *Trippe vs. Provident F. Society,* 140 N. Y. 23, 35 N. E. 316."

The court used the words "strictly construed" in the sense of "literally or strictly interpreted."

We think the conclusion reached by the court in the case just cited is correct, and that a strict or literal interpretation of the language of the policy under consideration here, would imply that the notice must be given regardless of the question of knowledge by the assured, even more strongly than it does in the case referred to.

It will be observed that in the case last cited the court following the Trippe case, refused to adopt a strict interpretation. This, of course, was due to

the language of the conditions and to the fact that in both cases the condition operated subsequently to the loss and its strict interpretation would have caused a forfeiture of an existing right.

In the case of *Columbia Paper Stock Co. vs. Fidelity & Casualty Co., supra*, where the policy was against loss from liability and required immediate notice, the court said:

"Provisions of this description also affecting the action of the assured *subsequently to the event*, and after the loss * * * have received in this state a construction of the utmost liberality toward the beneficiary, to obviate a forfeiture. Our conclusion, therefore, is that, *if no time is specified* or notice is required to be given immediately, notice given with diligence and in a reasonable time * * * is a legal compliance with such condition."

In this case it was held that knowledge on the part of the assured was necessary to charge him with default in giving the notice, but the decision rested entirely on the cases construing the word "immediate" and the opinion clearly indicates that if the word "immediate" had been followed by words fixing a definite limit of time, as in the case at bar, the condition would have been literally enforced.

The last case refers to the case of *McFarland vs. U. S. Mutual Acc. Ass'n.*, 27 S. W. 436. It, how-

ever, was a case of condition subsequent. On page 439 of the decision the court said:

"It is frequently impossible under the circumstances of the accident or death, to give immediate notice. This condition *subsequent* must be liberally *construed* in favor of the beneficiary."

We concede that for the following reasons, it is held by many of the courts that where notice is required to be given "immediately" or "forthwith" after the happening of an accident, these words are uncertain and indefinite, if treated as words defining a period or limit of time, because literally they mean without any interval of time. They say that the very nature of the undertaking indicates on its face that this was not the meaning intended by the parties, consequently, on account of the ambiguity, the courts rightfully exercise their prerogative of determining what the words do mean, and by analogy determine that they mean within a reasonable time, having in view all of the circumstances. One of the circumstances is the knowledge, or the absence of knowledge by the assured, and they say that a reasonable construction requires that this circumstance should be taken into consideration and that taking it into consideration it would be unreasonable to require the party to give notice of that of which he has no knowledge.

This *construction* of the contract, however, is only indulged by these courts, where the parties

have left the subject ambiguous by the terms they have employed to define it, or where it is a condition subsequent. Where such is not the situation they have not done so, as there is no basis for such construction and the contract must be enforced as it is written.

If one enters into a contract binding himself as a condition precedent to perform a certain act before the happening of some event, it would be no excuse for him to urge that he did not perform the condition because he did not know that the event had happened. If he intended that his performance should depend not upon the happening of the event, but upon his knowledge of its happening, he should have so stipulated in his contract. If one binds himself as a condition precedent to perform a given act "at the latest within ten days" after a certain steamer reaches the port of New York, he is bound to perform his contract within the time fixed after its arrival, without regard to the question whether he knew it had arrived. If his performance was to depend on his *knowledge* of its arrival and not on its arrival, he should have so stipulated.

In one of the cases referred to in our brief, in which an accident policy was involved, the man fell into the water, which froze, and his body was not discovered until the following spring. There it was held that the condition being a *condition subse-*

quent to the attaching of the liability, a liberal construction would be put on the limitation of time and it would be construed to mean that notice should be given within the time fixed, after knowledge of the accident was acquired by the party charged with the giving of it. The court urged that it was impossible to give notice of that of which he had no knowledge.

Impossibility of performance often relieves against the breach of a condition subsequent, but not against the breach of a condition precedent.

In the case at bar it is urged that it is unreasonable to require a man to do what is impossible. That is, to give notice of that of which he has no knowledge. It would seem that this policy was drawn with the view of cutting off such a contention. If it had stopped with the use of the word "immediately," the contention of appellant might under some authorities, be correct, for in such case the court might say that the word "immediately" invites a reasonable construction which involves the idea that one should not be required, unless he expressly engages so to do, to give notice of that of which he has no knowledge. When, however, a time limit is fixed in addition, it seems proper to conclude that the parties themselves determined and agreed on what was reasonable and fixed "ten days at the latest" as the limit of time which was reasonable to acquire the information

and give the notice. This seems clear. If he acquired the information before the expiration of the ten days and did not then give the notice within a reasonable time thereafter, he would probably be in default even if the ten days had not elapsed.

ANSWER TO BRIEF OF PLAINTIFF IN ERROR AND REVIEW OF ITS AUTHORITIES.

The first question of importance discussed by plaintiff in error is the question whether, by the terms of the policy, it was required to give notice of the accident within ten days after it occurred, whether it knew of it or not. We do not care at this point, to pay any attention particularly to the argument contained in the brief on this subject, but we will review the authorities cited in support of it.

On page 13 of the brief of plaintiff in error is cited the case of *Aetna Indemnity Co. vs. Crow*, 154 Fed. 545. An examination of this case will show that the provision in the policy required notice to be given "immediately after the occurrence of such act shall have come to the knowledge of the employer." The question whether notice should have been given before the assured had knowledge of the accident, was, therefore, not involved in this case. The court construed the word "immediately" to mean within a reasonable time, or

without unreasonable delay. No further comment on this case is necessary.

To support the proposition that notice need not be given until knowledge had come to the assured, on page 14 of its brief plaintiff in error cites the case of *American Surety Co. vs. Pauly*, 170 U. S. 133, 42 Law. Ed. 977. In this case the policy required that notice should be given "as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." The question, therefore, whether the notice should have been given before the employer knew of the act, was not involved in this case and we see no reason why it should have been cited. As a matter of fact the dishonesty of the employee was the act and the insurance company took the position that it was the duty of the assured to give notice of the act, as a dishonest act, on mere suspicion. The court held that the condition should be construed so that the notice need not be given until it knew that the act was a dishonest one. We fail to see how this case is applicable to the case at bar.

On page 16 of the brief of plaintiff in error a quotation is made from the opinion of this court in the *Empire State Surety Co.* case, and it is stated that the contention made by counsel is supported by a practical unanimity of authority, including the Supreme Court of the United States. With this strong statement counsel does not cite a

single case from the Supreme Court of the United States, or elsewhere, sustaining the proposition. It may be conceded that the authorities are almost unanimous in holding that the words "immediately," "immediate" and "at once" are construed to mean within a reasonable time. If this is what counsel refers to we do not dispute the correctness of his statement.

On page 16 of the brief reference is made to the case of *Mandell vs. Fidelity & Casualty Co.*, 49 N. E. 110, to support the proposition that notice need not be given until knowledge of the accident is acquired. We have already pointed out to the court that this case required the giving of "immediate notice" and this rendered it open to construction, and that the court held that the duty to give notice did not arise until the assured had knowledge of the accident, and based the decision on the proposition that the condition was a condition subsequent, distinguishing the case from one where the condition was a condition precedent, and pointing out that the liability of the insurance company became fixed when the accident occurred. The decision in this case was proper, but it has no bearing whatever on a case where the condition is a condition precedent and there is no ambiguity justifying construction by the court, with reference to the question of time within which the notice must be given. As a matter of fact, the case is based largely

on the case of *Trippe vs. Provident Fund Society*, in which the court expressly said that the condition, being one to be performed after the liability attached, was a condition subsequent and should be liberally construed.

On the same page reference is made to the case of *Germania Ins. Co. vs. Boykin*, 12 Wallace 443, 20 Law. Ed. 442, in support of the same proposition. This was the case of a policy of fire insurance and the breach of it did not even consist in a failure to give notice of the fire within the stipulated time, but it consisted in a failure to make proofs of loss, owing to the insanity of the insured. The court merely held that insanity excused the performance of the condition. It was a condition subsequent, the nature of which is not stated in the opinion.

It may be conceded that in the interpretation of conditions subsequent, which, by the terms of the contract, are to be performed after the right of the insured to indemnity has attached, a liberal construction of the policy is adopted to prevent a forfeiture and to prevent the defeat of the purpose of the contract. This is in accordance with the most elementary rules.

On page 17 of the brief, to sustain the same proposition, is cited the case of *Edgefield Mfg. Co. vs. Maryland Cas. Co.*, 58 S. E. 969. This is an-

other case in which the policy provided that the insured should give immediate notice of an accident, with full information concerning it. It was held that this meant that it should be done with reasonable promptness, under the circumstances.

We have not questioned that where the words in a condition are for "immediate notice," the ambiguity in these words justifies the court in construing them and putting on them a reasonable construction.

On page 17 of the brief of plaintiff in error reference is made to *Woodmen's Acc. Ass'n. vs. Byers*, 87 N. W. 546. This was an action on an accident policy where the insured claimed to have been disabled. The policy provided that notice should be given within ten days from the date of the injury. In this case the condition was treated as a condition subsequent, as it was in fact, and the court said:

"It is well to note here that we are not considering a question of complying with conditions before loss or injury."

The court quotes from the case of *Trippe vs. Society, supra*, the following language:

"The condition upon which the defense is based was to operate upon the contract of insurance only subsequent to the fact of a loss. It must therefore receive a liberal and reasonable construction in favor of the beneficiaries."

The court practically concludes its opinion with these words:

"From the foregoing, the conclusion is, we think, fairly deducible that in construing conditions in a policy of insurance with respect to the giving notice of the happening of the event, and the particulars thereof, and preliminary proofs, to be complied with subsequent to the event resulting in loss or injury, and for which indemnity is claimed, a more liberal construction in favor of the beneficiary should be given than when the conditions are to be complied with prior to the happening of such event. * * *"

The opinion in this case is a very long one and the question might have been disposed of in a very few words. The condition, being one operating subsequently to the loss, it was proper to construe it as the court did.

On page 18 of the brief of plaintiff in error, in support of the same proposition, reference is made to the case of *Phillips vs. U. S. Ben. Soc.*, 79 N. W. 1. The opinion in this case is very short and no authorities are cited to sustain the conclusion. It was a case of an accident policy providing for the giving of *immediate* notice, with full particulars. This was a condition subsequent and in addition it was proper to construe it liberally, in accordance with the decisions construing these words.

On page 18 of the brief of plaintiff in error, to support the proposition that where a policy is sus-

ceptible of two constructions, the one most favorable to the assured will be adopted to save a forfeiture, there is cited the case of *Imperial Fire Ins. Co. vs. Coos*, 151 U. S. 452, 38 Law. Ed. 231. It is strange that this case should have been cited by plaintiff in error. The court used this language:

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense."

The court held that the motion for judgment should have been granted.

On the same page reference is made to *London As. Co. vs. Companie, etc.*, 167 U. S. 42, 42 Law. Ed. 113. The policy contained a provision with reference to the ship being in collision. The insurance company contended that collision meant a *serious* collision, but the court rejected this contention, holding that the words "in collision" meant in collision and that if the insurance company had meant "in serious collision" they failed to say so.

In this connection we desire to call the attention of the court to the case of *Guarantee Co. of N. A. vs. Mech. Sav. Bk. & T. Co.*, 183 U. S. 402, 46 Law. Ed. 253, where the court emphatically refused to

apply the rule invoked by plaintiff in error where there was no ambiguity in the condition.

The case of *Fid. & Dep. Co. vs. Courtney*, 186 U. S. 342, 46 Law Ed. 1193, is also referred to by plaintiff in error to support its contention that notice need not have been given under the policy involved in this case, until knowledge of the accident had come to it. We merely call the attention of the court to the fact that in the Courtney case the condition required that "immediate notice" should be given and this case, following the case of *Ward vs. Maryland Cas. Co., supra*, held that the word "immediate," being ambiguous, should be reasonably construed.

If the notice in the case at bar had been given nine days after the accident and we had contended that it was not given "immediately," the word "immediately" would be open to construction on account of its ambiguity, and the court would hold, under such circumstances, that the question was whether the notice was given with reasonable promptness under all the circumstances of the case.

On page 21 of the brief of plaintiff in error the point is made that the failure to give the notice was immaterial unless the company was prejudiced by not having notice sooner. No authority is cited to sustain this proposition, except the case of *Parmalee vs. Aetna Life Ins. Co.*, 166 Fed. 741. In

this case notice was given and afterwards an action was begun and default was taken upon what was alleged to be a false return of service and a year afterwards the assured found out about the suit and gave notice to the insurance company. It was held that the policy could not be defeated without showing that some damage resulted. No reasons are given and the decision is based on *Ward vs. Maryland Cas. Co., supra,* in which it was said:

"That unless there was a provision in the policy making such a failure a cause of forfeiture, it would not be so treated."

Rumford Falls Paper Co. vs. Fid. & Cas. Co., 43 Atl. 503, is cited in the Parmalee case, but the question of law does not appear to have been presented in the case, the court merely passing on the sufficiency of the evidence to sustain the charge that there was collusion between the assured and the injured person.

We believe that no case can be found where it has been held that in addition to showing a breach of a condition precedent, it is also necessary that the insurance company should show that it was damaged by reason of the breach, nor can a case be found where it was held that a breach of a condition precedent would not be enforced unless there was a provision for a forfeiture in case of its breach. The word "forfeiture," when applied to

conditions precedent, is a misnomer, but one court used it in this way.

The universal rule is that where the condition is a condition precedent, its breach is fatal without regard to the question of damage resulting from it.

Nat'l Sur. Co. vs. Long, 126 Fed. 887.

Imperial Fire Ins. Co. vs. Co. of Coos, 151 U. S. 38, Law Ed. 231.

The case of *Nat'l Sur. Co. vs. Long*, 125 Fed. 887, cites many cases and particularly the decisions of the Federal courts and is a very full and complete case on the subject.

The case of *Hope Spoke Co. vs. Maryland Cas. Co.*, 143 S. W. 85, also contains a full review of the question, citing many cases and distinguishing those where the conditions were conditions precedent from those where they were conditions subsequent. It uses this language:

"The following authorities fully sustain the view that failure to give notice within a specified time in accordance with the terms of the policy, does not operate as a forfeiture of the right to recover, unless the policy in express terms or by necessary implication makes the giving of notice within a time specified, a condition precedent to recovery. *Accident Ins. Co. vs. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Am. & Eng. Ann. Cas. 916; *Southern Fire Ins. Co. vs. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A.

70, 78 Am. St. Rep. 216; *Insurance Co. vs. Downs*, 90 Ky. 236, 13 S. W. 882, 12 Ky. Law Rep. 115; *Flatley vs. Insurance Co.*, 95 Wis. 618, 70 N. W. 828; *Tubbs vs. Insurance Co.*, 84 Mich. 646; 48 N. W. 296; *Steele vs. German Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; *Mason vs. Insurance Co.*, 82 Minn. 336, 85 N. W. 13 ,83 Am. St. Rep. 433; *Taber vs. Insurance Co.*, 124 Ala. 681, 26 South 252.

"Nothing in the opinion of this court in *Teutonia Ins. Co. vs. Johnson*, 72 Ark. 484, 82 S. W. 840, conflicts with the views we now express, for that decision was based upon the fact that under the terms of the policy the requirement for notice was made a condition precedent to recovery."

In the case of *Imperial Fire Ins. Co. vs. Co. of Coos*, 151 U. S. 452, 38 Law Ed. 231, the following language was used:

"The specific thing described in the last condition as avoiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk."

It is said, however, that this contract is to be construed according to the laws of the state of Washington, and thereupon certain decisions of the Supreme Court of that state are cited. These cases are all alike in one respect. They relate to the

question of the liability of the surety on a bond and enunciate the well established elementary rule that delay in giving an extension, or some act of that kind, will not discharge the surety, unless he has been damaged.

The case of *Beebe vs. Redward*, 35 Wash. 615, is one of the cases and the court held:

"The surety therefore cannot complain of any breach of the contract which the owner waives that does not operate to his prejudice. * * * In the case at bar there is no showing that the surety has been prejudiced by the failure to complete the building at the time stipulated in the contract, and as the owners for whose benefit the stipulation was inserted make no complaint because thereof, the surety cannot plead it as a bar to the right of the owners to recover for subsequent losses."

We see nothing in this case applicable to the case at bar.

The case of *Ovington vs. Aetna Ind. Co.*, 36 Wash. 473, is cited. In this case notice came to the owner that two persons who had performed work on the building had not been paid. He did not notify the bonding company. The bond contained a provision that notice should be given to the company of any act on the part of the contractor which might involve a loss for which it, as surety, was responsible, after the occurrence of such act shall have come to the knowledge of the assured. The court held that the terms of the policy showed that the obliga-

tion of the contractor was not to permit claims for builders' materials and labor to become a charge upon the property, and that until there was an effort made to make them a charge on the property, no notice was necessary. The condition in question was construed with reference to other clauses in the bond.

The case of *The United States, for the use, etc. vs. Aetna Ind. Co.*, 40 Wash. 87, does not touch the question in support of which it is cited. Certain evidence was offered showing that an owner had granted a certain indulgence to the contractors, but the Supreme Court held that it was not admissible under the issues in the case.

The case of *Sheard vs. U. S. F. & G. Co.*, 58 Wash. 29, is cited, but for what reason we know not. There was a delay in bringing suit. The Supreme Court held that the breach did not occur until the liens became an established charge and that the limitation of the time for bringing the suit was to be construed so that if there was a reasonable excuse for delaying the suit, the surety would not be discharged.

There is one case, however, which is worthy of citation because it has a direct bearing on this case and on this question. We refer to the case of the *Deer Trail etc. Mining Co. vs. Maryland Cas. Co.*, 36 Wash. 46, in which the right to recover on

a policy providing for immediate notice was denied where the accident occurred in May and the notice was given the January following. It is held that this was an unreasonable delay. There were two parties concerned with the policy; one knew of the accident, but did not know of the policy; the other knew of the policy, but did not know of the accident. All parties seemed to take it for granted that the question of prejudice was immaterial.

This is about the only Washington case that has any direct bearing on the question.

At the bottom of page 22 of the brief of plaintiff in error is found the statement that plaintiff in error was forbidden to settle the action and was obliged to take the chances of a law suit, and is much worse off, etc. As a matter of fact it is settled by an overwhelming array of authorities, that where liability has been denied by the insurance company, and it has refused to defend, the assured may settle and compromise if he pleases, and may thereupon recover against the insurance company for its liability for the fair amount paid in settlement of the case.

On page 25 of the brief of plaintiff in error is found his argument to sustain the proposition that the court below erred in excluding evidence of the attorneys' fees and costs incurred on the appeal to the Supreme Court of the case of Merrill against

plaintiff in error. The argument is hardly worthy of notice. The case cited, as well as the doctrine invoked, contradict rather than affirm the rule for which plaintiff in error contends. It may be conceded that where one who is liable over, is given notice to defend the action and he fails to do so, the costs incurred in the defense by the person sued may be recovered in an action brought against the other person, but this is only in the event that the person to whom notice was given is liable for the cause of action on which judgment was rendered. In other words, the costs follow the question of original liability. In this case we merely contend that, there being no liability, defendant in error is not responsible for any costs, and even if there was a liability it would not be responsible for the costs on appeal, because it was optional with plaintiff in error to appeal the case.

Much stress is laid by plaintiff in error, John B. Stevens & Company, on a recent decision rendered by this court in the case of *Empire State Surety Company vs. Northwestern Lumber Company*, the opinion in which case is before the writer. This brief, with the exception of this particular part, was written before this opinion came out, and it concedes that many of the cases hold that where notice was required to be given "at once" or "immediately," or "at once with full particulars," the ambiguity in these words as denoting a period

of time, rendered them open to construction to determine their meaning.

The case under discussion is a case where notice was required to be given "at once" and this court, following other courts, held that the words "at once" were ambiguous and were to be construed to mean within a reasonable time, having in view all of the circumstances of the case, and that with this construction as to reasonableness put on the words they would be held to mean "at once or within a reasonable time after notice of the accident had been acquired." This was held on the theory that it would be unreasonable to require notice to be given before knowledge of the accident existed. We must conclude on account of our high respect for the care and learning of this court, that the decision in the case under discussion was intended to be limited to its facts and that the language of the court, "the clause (F) alluded to does not require that he shall give the notice whether he has such knowledge or information or not," and the language which precedes it, were intended to be applied to conditions of the character of the one involved in this case. It must be evident that the conclusion reached by this court means that the words "at once," being ambiguous, are open to construction and that with a reasonable construction put on them they mean "at once or within a reasonable time after knowledge of the accident

had been acquired," because it would not be reasonable to require notice when the party does not know of the accident.

In the opinion under discussion, the court said:

"It is self evident that a party cannot give notice of an accident, of which a claim can be made, until he himself is informed of it, or has knowledge concerning it, and he could not be expected so to do."

This language of the court when reduced to terms of legal significance, points either to the impossibility of giving notice under such circumstances, or to the unreasonableness of such a requirement, but whether it points to the unreasonableness or to the impossibility, it was used by the court, not for the purpose of determining the validity or the binding force of the condition under consideration, but it was more in the nature of an argument addressed to the question: What would be reasonable for the court to expect or require of a party in the matter of giving notice of an accident, in the absence of a contract defining it, under the facts and circumstances of the particular case?

If I bind myself to perform an act within ten days after a ship arrives at the port of New York, as a condition precedent in the execution of an agreement, it makes little difference what difficulties there may be in obtaining the information when the ship arrives; having made the contract

and assumed the duty of doing so, I must comply with it if I expect to claim any right dependent upon its performance. If it were necessary to support this rule by any presumption, the presumption would be either that I took the chances, or that I thought that I would be able to inform myself of its arrival, but this presumption would be of no legal significance, as its presence or its absence would not affect the obligation assumed by me. On the other hand, if I undertook to give "immediate notice" or notice "immediately" upon its arrival, it might well be claimed by me that the words "immediately" or "immediate" are uncertain and ambiguous as indicating the time within which the notice must be given. The ship might come into port at night at some unexpected time and leave without my having an opportunity, for some time, to ascertain that she had been present.

If the question of the meaning of the word "immediately" or the word "immediate" came before the court, it would be held to mean that notice must be given within a reasonable time, under all circumstances of the case, and if the court was then called on to say, as a matter of law, what was reasonable under the circumstances, it might, with propriety, decide that it would be unreasonable to say, under the known circumstances, that the party should have given notice until he knew that it had arrived, but when this statement is analyzed it is

found to be more of a statement of a legal conclusion with reference to the facts of the case, than it is the statement of a legal rule.

With the question of the impossibility of performance we have no concern in this case.

L. E. Law & Co. vs. Paxton, 93 S. W. 354.

Stockton vs. Weber, 98 Cal. 441, 33 P. 332-335.

We have no disposition to cavil at the conclusion of this court above referred to, if it is limited to those cases where ambiguity in the expression of a condition precedent renders it proper to reach the intent of the parties by *construction*, or to those cases where the condition is a condition subsequent admitting of the application to it of the rules governing such conditions, but we most vigorously protest against the application of the language in question, to a condition which is not only a condition precedent in its character, but one which is expressly made so by the terms of the contract and which is entirely free from any kind of ambiguity which might justify the court in undertaking to *construe* it and to impart to it *a meaning beyond its language.*

The unreasonableness of a condition precedent does not in any way affect its validity and it must be strictly and literally performed.

6 Am. & Eng. Encyc. of Law, 504.

The opposite is true of a condition subsequent.

6 Am. & Eng. Encyc. of Law, 506.

On the breach of a condition subsequent the estate may or may not become forfeited. On the breach of a condition precedent no estate vests.

If for any reason a condition precedent is or becomes impossible of performance, no estate vests.

6 Am. & Eng. Encyc. of Law, 506.

These propositions are elementary.

Nothing is more common than to find in the decisions of the court, whether they relate to the interpretation of statutes or of contracts, the expression that the subject is not open to construction; its meaning is plain and manifest and it is complete in itself.

It has been said by some of the courts that ordinarily the distinction between interpretation and construction is of little value and of little aid to them. The case at bar, however, well illustrates the value as well as the soundness of the distinction.

A provision that "upon the occurrence of an accident the assured shall immediately, and at the latest within ten days, give notice," is not ambiguous and there is no reason for construing it.

There is a difference between the interpretation

and construction of a contract. Interpretation differs from construction "in that it is used for the purpose of ascertaining the true sense of any form of words," while construction involves the drawing of conclusions regarding subjects that are not always included within the direct expression.

Bloomer vs. Todd, 3 Wash. Ter. 612.

"It would seem to follow from the statement just made as to the object of interpretation, that if the language of the instrument is plain and unambiguous, in itself, there is no room for interpretation or construction and it is quite frequently so stated."

17 Am. & Eng. Encyc. 4. Cases cited note 3.

Whenever parties define the limits of their rights and obligations * * * the compact controls and there is no room for the application of a legal theory that might govern in the absence of an express agreement.

First Nat. Bank vs. McIntosh & Peters Live Stock and Commission Co., 84 P. 535.

Rules of construction are only for reaching the probable intent of the instrument construed.

Moran vs. Lezotte, 19 N. W. 757.

The language used, if unambiguous, must be held to express the intention of the parties.

Piano Co. vs. Ellis, 35 N. W. 841.

In determining the question whether there is

any ambiguity in the condition in question which justifies the court in looking *beyond its words* for the purpose of ascertaining some hidden *meaning*, we must bear in mind that the words involved in the condition in this case have relation solely to the *period of time* within which notice must be given, after the occurrence of the accident. When the condition, in express language, says that this notice must be given within ten days after the happening of the accident, there is no ambiguity involved in the question of time. It is to be noted further, that the condition involved in the case at bar says, that "upon the occurrence of an accident and within ten days thereafter at the latest," and that it clearly fixes as the commencement "upon the occurrence of the accident," and as the termination of the period of time, "within ten days." It is thus seen that there is no ambiguity as to the time when the period of time commences to run or the time when it terminates. The expression of the condition is absolutely complete and entire.

On what basis a court could claim the right to determine the meaning of this perfect expression of time, by attaching to it the question of knowledge of the accident, a subject and a question not involved in it, is incomprehensible to us. Such a proceeding as we have pointed out could only be justified by some ambiguity in the expression of

the condition, and, as we have shown, there is no ambiguity.

In the case of *Imperial Fire Ins. Co. vs. County of Coos*, 151 U. S. 452, 38 Law. Ed. 231, the court used this language:

"The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. * * * It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

In this connection and as indicating the sound view to take of this subject, we desire to refer to the case of *Guarantee Co. of N. A. vs. Mechanics' Sav. Bank & T. Co.*, 183 U. S. 402, 46 Law. Ed. 253-262.

In this case notice was required to be given immediately on the assured "becoming aware of any defalcation." It was contended that these words should be construed most strongly against the insurance company, so as to mean that notice should be given when the assured "had knowledge." The Supreme Court said there was a difference between the two phrases and that they would not construe

the words so as to impart to them this meaning. Referring to the rule invoked on the question, that insurance contracts are construed most strongly against the company, the court used this language:

"But this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties and embodying requirements compliance with which is made the condition to liability thereon."

This case is referred to in the case of *Fidelity & Deposit Co. vs. Courtney*, 183 U. S. 402, *infra*.

The cases cited by this court in its opinion now under discussion, are cases which have no bearing on the interpretation of the condition involved in the case at bar. These cases are four in number. The first one is the case of *Ward vs. Maryland Casualty Co.*, 51 Atl. 900, 93 Am. St. Rep. 514. It does not appear from the report of this case whether the condition was a condition subsequent or a condition precedent. In other words, it does not appear whether the policy involved was to indemnify against *liability* or was to indemnify against *loss* from liability. If it was the former the condition was, in a sense, a condition subsequent and would not be enforced if it was unreasonable. If it was the latter the condition was a condition precedent. The decision, however, merely turned on the proper construction to be placed on the condition, for the reason that the word "imme-

diate," as denoting an interval of time, was ambiguous.

The second case referred to is *Fidelity & Deposit Co. vs. Courtney,* 186 U. S. 342, 46 Law. Ed. 1193. This was an action on a bond to indemnify against fraud, providing that *immediate* notice of a default must be given, and the Supreme Court adopted the reasoning in the case of *Ward vs. Maryland Casualty Co., supra.* In addition it may be said, that this was a condition subsequent and it admitted of a reasonable construction, both by reason of its ambiguity as well as of its character.

Mandell vs. Fidelity & Deposit Co., 49 N. E. 110, is the third case referred to by the court on this question. It will be observed that in this case the policy indemnified against *liability*, and, as we have pointed out in this brief, upon the happening of the accident the liability became fixed and a condition to be thereafter performed was a condition subsequent and was construed so as not to impair or divest a right which had already attached, to-wit: the right of indemnity against the liability. The decision in this case can be justified on either ground, that the word "immediate," as denoting an interval of time, was ambiguous, or that the condition was a condition subsequent.

In this case the court clearly indicated that it had in mind the distinction between conditions prec-

edent and conditions subsequent by contrasting it with another case and using this language:

"Here the plaintiff's liability to make the compensation which was the thing insured against, was fixed by the accident."

The latter case seems to depend chiefly on the case of *Trippe vs. Provident Fund Soc.*, 35 N. E. 316, which was an action on an accident policy requiring notice to be given with "full particulars," and it was held that the condition contemplated that the notice should not be given until the particulars were obtained, but in the decision itself it says:

"This construction secures to the defendant every benefit and advantage that was intended by the provision of the policy and it cannot, therefore, complain if the very harsh and technical meaning which it now seeks to put upon a *condition subsequent*, is rejected."

It will thus be seen that the Trippe case turned upon the proposition that the condition was a condition subsequent and was therefore open to a reasonable construction.

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 746, is the fourth case referred to by this court on this subject. In this case the policy indemnified against *liability* and the right of the assured to indemnity attached upon the occurrence of the accident imposing a liability on it. A condition to be

performed after the attaching of this liability was a condition subsequent, and was therefore subject to a reasonable construction. The policy also provided for "immediate notice."

We desire to call the attention of the court to the following significant language in the opinion in this case:

"Strictly construed, the insured would be bound to give notice immediately after the accident, whether he knew of the occurrence or not."

We think this is the truth of the whole matter and we think it follows with much greater force, that the condition of the policy in the case at bar, if taken literally, means the same thing. It will be observed, however, that in the Woolverton case the strict interpretation was rejected, the condition being a condition subsequent, and this rejection was based on the ground that the condition was unreasonable. As we have pointed out in the Trippe case the court undertook to and did construe the provision there in question, for the reason that it was a condition subsequent which admitted of construction. In other words, a construction was put on the condition subsequent which would prevent a forfeiture of an existing right and a defeat of the purpose or object of the contract.

We find in the decision of this court in the Empire State Surety Company case nothing leading

to the conclusion that our position with respect to the condition involved in the case at bar, is incorrect, although we find much in the other cases cited by the court, to support the view that it is a sound and reasonable conclusion.

In this connection we desire to call the attention of the court to a fact which ought to be conclusive of this question. As appears from the case under discussion and other cases referred to in our brief, for years the courts have construed the words "immediately" and "at once" to mean within a reasonable time, and that a reasonable time is such time as is reasonably necessary for the giving of notice after knowledge of the accident has been obtained, and in one case, where the notice was required to be given within a fixed time "with full particulars," and the condition was a condition subsequent, it was held that in such a case it meant within the fixed time after such knowledge of the accident came to the party as enabled it to give "full particulars." It is fair to conclude that the framers of the policy in question in the case at bar, were familiar with these decisions and that the policy was worded with reference thereto, and that when to the word "immediately" the words "and at the latest within ten days" were added, they were put in the policy in order to prevent the construction which would have been adopted by the court if only the word "immediately" had been used.

When the courts, construing the words "immediately," "at once," or "immediate," declared them ambiguous as indicating a period of time, and held that by reason of this ambiguity they would be construed to mean within a reasonable time after notice of the accident was acquired, and the framers of this policy, recognizing this view and for the purpose of making that definite and certain which the courts had declared ambiguous, added the words "and at the latest within ten days," the courts should hesitate and refuse to deprive the makers of such a contract of the benefits arising from an expression of it in harmony with and in conformity to, the decisions of the courts already rendered. By the decisions referred to the courts said, in effect: "Make your provision with reference to the time in which notice must be given, plain and unambiguous and it will be enforced as it is written." The policy in question meets this requirement. We believe the foregoing proposition should be conclusive on this question.

It will be observed, it is not claimed by plaintiff in error that there was any understanding between it and defendant in error that notice of an accident need not be given until after knowledge of it had been acquired. The contention of plaintiff in error is, that the words used in the condition in the policy mean this as a matter of law, because it is proper for the court to give this meaning to the

words actually used, by construing them with reference to an idea and a subject not embraced within them.

Suppose we put the question of the ambiguity of the language used in the policy and the right of the court to attach to it, by construction, the meaning contended for by plaintiff in error, to a practical test. The contract is in writing. If plaintiff in error should have contended that there was a contemporaneous or an antecedent oral agreement that notice need not be given until knowledge of the accident had been acquired, and should have offered evidence to this effect, would it not have been rejected for the reason that it would vary, contradict, or alter the terms of a written contract?

If a contract says that within ten days after the occurrence of an accident notice must be given, to say that the notice need not be given until ten days after knowledge of the accident had come to the assured, would certainly be a variation and an alteration of the terms of the contract. It would be more than that; it would be a new contract.

It may be conceded that if some portion of an agreement between the parties is not incorporated in the written contract, parol evidence of it may be introduced, provided it does not vary, alter, or contradict the plain language of the written instrument.

It may also be conceded that where a contract is ambiguous in its terms, that is, where its words do not plainly express a definite and fixed idea in harmony with its purpose, parol evidence of the meaning of them may be introduced, but, it will hardly be said that, in a case where the meaning of the words is perfectly plain and where they express a fixed, clear and definite idea, wholly in harmony with the purpose of the contract and with its other provisions, the court will give to them a meaning which contradicts and varies their plain import, and will do this under circumstances where the parties would be denied the right to show by parol that such was the understanding or that the words were intended to express that meaning.

The purpose in dealing with a condition precedent of this character, however, is to determine not its reasonableness, but its meaning. If the right of the court to determine by construction, the meaning of a condition precedent in a policy containing the provision that "immediate" notice shall be given, depends on the fact that the word "immediate" is indefinite and ambiguous, as indicating a period or a limit of time, and if it is this uncertainty in its meaning which justified some of the courts in declaring that they would construe the word to mean notice within a reasonable time and therefore within a reasonable time "after knowledge of the accident," then it seems self-evident that if the limit of time indicated by the

word "immediate" is made certain by such words as "at the latest within ten days," the element of uncertainty upon which the construction of the courts is based, is utterly removed and absolute certainty with respect to the period of time is established by these words.

No court has undertaken to interfere with the contract of the parties where a condition precedent is expressed in terms so absolute and certain as are the terms of the one in the case at bar. The language of the condition is particularly emphatic. It not only says "within ten days," but apparently for the purpose of putting the matter beyond any question, it says "*and at the latest* within ten days."

Some pertinent language on this subject is found in the case of *Teutonia Ins. Co. vs. Johnson, et al.*, 82 S. W. 840, where the court said:

"The courts cannot make contracts between parties, nor can the courts at all times determine what is material and what is not. These things are left to the parties to determine for themselves, as a general rule. We cannot, also, see the particular reason the parties have in mind when making their contracts. We construe the meaning of these contracts when construction becomes necessary; but when undisputed conditions are made we are bound by them, as are the parties to such contracts."

It cannot be said in this case that the court had no right to take the question from the jury,

or to pass on the effect of the evidence, if the view he took of the condition was a correct one.

Where the facts are undisputed, the question becomes one of law for the court, and in this case, if the court is of the opinion that the policy required the giving of notice within ten days from the date of the accident, there was nothing for the jury to decide on this subject and the court properly took the question away from the jury by instructions.

Travelers' Ins. Co. vs. Myers, 57 N. E. 458.

Kansas & A. V. Ry. Co. vs. Ayers, 35 S. W. 515.

Nat'l Sur. Co. vs. Long, 125 F. 887.

To which might be added numberless other cases.

If the question was whether notice was given within a reasonable time, under the facts, if the facts were in dispute it would be a question for the jury. If the facts are not in dispute some of the cases hold that the question of reasonable time is for the jury and some hold that it is for the court.

In the case of *The Deer Trail etc. Mining Co. vs. Maryland Cas. Co., supra,* the Supreme Court of the state of Washington held that it was a question of law for the court.

We submit that the court correctly rule on the question involved in the writ of error of John B. Stevens & Company.

Brief of the Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Plaintiff in Error, on Its Writ of Error.

STATEMENT.

By stipulation found on page 2 of the transcript of the record, it was agreed that this plaintiff in error might incorporate its brief on its own writ of error with its brief in answer to the brief of John B. Stevens & Company, plaintiff in error, on its writ of error, and this part of our brief is devoted to the discussion of the writ of error of The Frankfort Marine, Accident & Plate Glass Insurance Company.

The policy was for indemnity against loss from legal liability. (Transcript of record, p. 46). It also provided that no action should lie against the company for any loss, unless it should be brought by the assured for loss actually sustained and paid in money. (Transcript of record, p. 52. Clause 16).

The policy also provided that upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately and at the latest within ten days, give

notice in writing of the accident. (Transcript of record, p. 47).

It appeared from the evidence in the case that the accident occurred in June or July and that no notice was given until suit had been brought in the latter part of October. The court held and so instructed the jury, that defendant in error was not entitled to recover what it had paid in satisfaction of the amount recovered by Merrill against it, by reason of its not having given the notice required by the policy. The court, however, over the objection of plaintiff in error to the evidence, held that defendant in error was entitled to recover the attorney's fees and costs expended in the trial of the case of Merrill against defendant in error in the Superior Court of Pierce County, Washington (Transcript of record, p. 44) but was not entitled to recover the costs and attorney's fees incurred on the appeal of the case. The position of the court is clearly shown on pp. 34, 35 and 36 of the transcript of the record and is shown by the instructions given by the court.

At the conclusion of all the testimony plaintiff in error moved the court for a peremptory instruction to find in its favor, which was overruled, and thereafter it filed a motion for judgment in its favor notwithstanding the verdict. (Transcript of record, p. 26). This was overruled and an exception was taken. The position of plaintiff in error

was that the failure to give the notice required by the policy deprived defendant in error of the right to have the case defended. The court, however, took the position that the provision of the policy with reference to defending the case was not affected by the question of notice.

It was stipulated in the case that the bill of exception filed, which includes the amendments proposed by us, record p. 63-4, should be treated as the bill of exceptions of both parties, for the purpose of reviewing the correctness of the ruling of the court on the motion for judgment *non obstante veredicto*, as well as on the question raised by John B. Stevens & Company on its writ of error. (Transcript of record, p. 3).

ASSIGNMENT OF ERRORS OR STATEMENT OF POINTS RELIED ON.

In this writ of error we rely on the proposition that the defendant in error was not entitled to recover anything on account of its failure to give the notice required by the policy and that the giving of this notice was a condition precedent to defendant in error's right to have the case defended by plaintiff in error, and that therefore defendant in error was not entitled to recover the costs it paid for making the defense in the Superior Court of Pierce County, Washington.

Inasmuch as the question of the effect of the failure to give the notice within ten days after the accident occurred is fully discussed in the briefs on the writ of error of John B. Stevens & Company, we will not, of course, discuss the question here, but will simply affirm that a failure to give this notice deprived defendant in error of the right to recover any sum under the policy.

The court below should have granted our request for a peremptory instruction, or our motion for judgment notwithstanding the verdict, and we assign the error of the court in failing to grant the request and the motion.

ARGUMENT.

Clause 3 of the special agreements embraced in the policy contains this provision:

"That if any legal proceedings are taken to enforce a claim against the assured, which would be covered by this policy if the assured were legally liable in respect to such claim, the company shall, at its own cost, undertake the defense or settlement of such legal proceedings in the name and on behalf of the assured, and shall have entire control of such defense, whether legal liability on the part of the assured in respect to the claim is proven as the result of such proceedings or not."

(Transcript of Record, p. 48, clause 3.)

It was contended in the court below, and the court adopted this view, that under the provision

quoted above this plaintiff in error was bound to defend the action of Merrill against the defendant in error, in the court of first instance, and at the same time the court decided that defendant in error had not given to plaintiff in error the notice of the accident to Merrill, required by the policy, and that, as a result thereof, it had no right to recover any loss thereunder. The theory on which this construction was placed on the provision in question is, that it was an independent undertaking on the part of plaintiff in error, and that the provision of the policy in reference to the notice of the accident did not in any way affect the question of its duty to defend the action.

It is evident from the character of the contract between the parties that this plaintiff in error had no interest in or concern with, any legal proceedings except those which were of such a character as might inflict a loss on defendant in error for which it would be entitled to indemnification by the terms of the policy. The difficulty of always determining in advance whether the proceeding was of such a character, led to the insertion in the policy, of the provision in question, for the mutual benefit of the parties to the contract. It was to the interest of plaintiff in error to have the right to defend the suit whenever defendant in error gave it the papers and indicated, in the manner pointed out in the policy, that it considered the proceeding

of such a character, and it was for the benefit of defendant in error that it should be so done. It was, however, not within the contemplation of the parties that plaintiff in error would defend all suits of every character brought against defendant in error, by its employees, in which it might be liable and sustain a loss thereby. Consequently it was expressly declared by the policy that the undertaking to defend the proceedings on the claims should be limited to those cases in which the character of the claims was such that, if the assured was liable therefor, they would be *covered* by the policy. In other words, the undertaking to defend was limited to such proceedings as were based on claims of such a character that if the assured was liable in respect thereto, and suffered loss from such liability, the company would be bound to indemnify it according to the terms of the policy.

The words "covered by the policy" are comprehensive. They involve a consideration of the question of the place where the accident occurred and the business in which the defendant in error was engaged, and we think also, the question whether even if defendant in error was legally liable in the proceeding, and if in other respects the claim of assured was covered by the policy, there would be a liability on the part of plaintiff in error to indemnify against the loss arising therefrom. In other words, they involve the question whether the

circumstances were such at the time of the commencement of the proceeding that there would be a right of indemnity in defendant in error for any loss it might sustain by reason thereof.

Unless there was a right to indemnify, plaintiff in error would have no interest whatever in the result of the proceeding, nor would defendant in error have any right to expect it to defend. As a matter of fact plaintiff in error could not defend under the circumstances shown in this case without waiving its right to disclaim liability, on account of the failure to give notice, unless it was done with an understanding with defendant in error, express or implied, that such a defense would not have such an effect.

If, without such an understanding, plaintiff in error proceeded to defend the action, such defense would be treated as a recognition of the fact that the claim was *covered by the policy* and it would be estopped from thereafter disputing its liability to indemnify defendant in error against the loss it might sustain by the proceeding. It is customary, under such circumstances, for the parties to enter into an express stipulation in which the assured agrees that if the company will defend the action, its doing so will not be treated as a recognition of its liability under the policy, and it is common, also, to insert in such stipulation the provision that such a defense of the action shall not be treated

as a waiver of the right of the company to disclaim liability for want of the required notice.

If we are correct in our assumption that the defense of an action by the insurance company, under the provision in question, where there had been a failure to give notice of the accident according to its terms, would, in the absence of an agreement on the subject, result in a waiver by the insurance company of its right to deny liability on account of a failure to give the notice, then if the construction which was put on this provision of the policy by counsel for defendant in error and the court, is correct, an anomalous situation would be presented in such a case. The absolute duty to defend under the contract would, by such a construction, be imposed on the company, and yet, if the company made this defense it would thereby waive its right to deny liability on account of the failure to give notice of the accident. The insurance company would be compelled to elect between defending the case and thereby assuming a liability which did not exist, or permitting the case to be defended by the assured and paying the expenses of such defense. This is not reasonable or just, and we know of no cause why this contract should be considered in a manner different from other contracts. It there is any ambiguity in the terms of the contract affecting this question, the fixed rule of construction must be applied to it.

That rule is, that the contract must be construed according to the intention of the parties, which, in the absence of other evidence, is to be deduced from the terms of the contract itself.

If we are not correct in our assumption that a defense of the character suggested by us would be a waiver of the right to deny liability on account of a failure to give notice, yet our conclusion is nevertheless correct, because there is nothing in the contract to suggest that the insurance company would undertake to defend any action where, owing to the situation at the time, there would be no liability on its part to indemnify against the loss that the assured might sustain by it.

If we look at this question from the standpoint of the assured, the unreasonableness of the construction which the court below placed on the provision in question becomes more apparent. If the terms of this provision compel the insurance company to defend the action where there was no notice and where it disclaims and has the right to disclaim liability for the lack of it, it follows of necessity, that this provision imposing the duty, gave an absolute right to do so and that this right to defend carries with it the right to control, compromise and settle the litigation, according to the provisions of clause 3, without regard to the wishes of the assured. Under such circumstances, will it be said that the provisions in question gave the right to the in-

surance company to defend the action in such manner, against the wishes of the assured, when, at the same time, it disclaimed liability? If the insurance company disclaimed liability the assured might not, and probably would not, care to have it direct and control the litigation, unless it assumed liability by so doing, and still less would it be willing to have the litigation settled and compromised by the insurance company. There is no escape from the conclusion that, where the insurance company, by the terms of the policy, assumes the duty to defend the proceeding, it has entire control of it and can settle and compromise it at will, without regard to the wishes of the assured, and this right applies in all cases where the duty to defend exists under the policy. A construction that would impose a duty on the insurance company to defend, and consequently a right to defend and compromise, when it denied and had the right to deny any liability under the policy, would create a hardship on the assured not justified by the circumstances. Such a construction of the policy is wholly unwarranted. Yet, this construction of the policy necessarily follows from the one adopted by the court.

Reinstating the foregoing argument, we desire to say that the construction placed on the clause in question by the court below, leads to one of two results, each of which seriously affects the rights of one of the parties to the contract. These are:

First: If it is the duty of the insurance company, under the clause in question, to defend where there has been a failure to give notice, and there is consequently no liability on the part of the company, such defense constitutes an assumption of liability in the absence of an agreement to the contrary, and this construction, in common justice, ought not to be placed on the contract.

Second: If defending the action under such circumstances, does not amount to an assumption of liability, then notwithstanding the fact that the insurance company may be disclaiming liability, it has the duty imposed on it to defend the action and the right flows therefrom to compromise and settle it on such terms as it deems best, although there is no liability on its part to pay the amount of the compromise. This is not fair and was not contemplated by the parties.

The cases, therefore, in which the duty to defend is imposed on the insurance company, with the right to compromise and settle, are those where it is liable to the assured, and this is what is meant, in part, by the words "covered by the policy."

We think it must be conceded that the duty to defend with the right to compromise at will, which follows the duty to defend, only exists where, if the assured is liable the insurance company must indemnify it, and that the words "covered by the

policy" mean, in part, where there is a liability to indemnify the assured.

Clause 2 of the special agreements in the policy, throws some light on this question. After requiring notice of an accident, it says:

"If thereafter the assured shall receive notice of any claim arising out of an accident *duly reported to the company as before provided*, or of any legal proceedings to enforce *such claim*, he shall, within three days, give notice thereof to the company in like manner, and shall forward to the company every summons and process as soon as the same shall have been served on him."

(Transcript of Record, p. 48 to p.).

This clause, having relation to claims arising out of accident *duly reported* to the company and to legal proceedings to enforce *such* claims, is immediately followed by Section 3 which has already been set out by us, in which the obligation of plaintiff in error to defend proceedings or claims against defendant in error, is expressly limited and defined.

A consideration of the extract just set out, indicates that the claims with which plaintiff in error has any concern are such as grow out of accidents *duly reported* according to the terms of the clause, and that the legal proceedings of which defendant in error was required to notify it, were legal proceedings based on *such* claims. It is such

proceedings, which are those otherwise covered by the policy, which plaintiff in error undertook to defend.

The test of the duty to defend the suit, under the policy, is whether the suit is of such a character that if defendant in error was liable therein, plaintiff in error would be bound to indemnify it against the loss that would accrue to it thereby.

Considering Clauses 2 and 3 of the special agreements together, it would seem that they provide:

First: For notice of the accident.

Second: After the notice of the accident has been given, for notice of any claim arising out of an accident *duly reported*, or of any legal proceedings to enforce *such* claim, and the forwarding of the summons and process connected with the proceedings.

Third: A defense of certain actions and proceedings.

Having provided in Clause 2 for the giving of notice of the accident and for the giving of notice of any claims or proceedings based on accidents *duly reported*, which should come to the notice of the assured *after* he had given notice of the accident and for the forwarding of the summons and papers in such proceedings, to the insurance company, the next clause undertakes to define the

character of the proceedings the insurance company will defend. It does not undertake to defend *all* of the claims or proceedings which are embraced in Clause 2, but the clear implication is, that it will not defend any which are *not* embraced within the terms of Clause 2.

The legal proceedings referred to in Clause 3, are the same legal proceedings which are referred to in Clause 2 and they are proceedings to enforce a claim arising out of an accident *duly reported* to the company, in accordance with the first provision of Clause 2, and the undertaking to defend such proceedings is by Clause 3 limited to such as would be embraced within Clause 2, if the assured were legally liable in respect to the claim asserted in the proceedings.

The words "covered by the policy" must be held to relate to the provisions of Clause 2 and cases in which there is a compliance with the provisions thereof, as well as the other elements of the place and character of the accident and the business in which the employee was engaged at the time of the accident.

It is not a reasonable construction to say that these two clauses considered together, mean that if there is a failure to give notice, and if consequently there is no liability on the part of the insurance company, and if thereafter a proceeding

is commenced on a claim of which no notice was given, the insurance company is bound to defend such claim.

One of the reasons for requiring the summons and process to be forwarded to the insurance company, or notice of the claim to be given, was to afford it an opportunity to determine whether it would defend the action or not, and to give it an opportunity to say whether it would deny liability and refuse to defend the action, on account of a failure to give the notice required by Clause 2 of the policy, and to enable it, also, to determine whether the proceeding was of such a nature that the claim would be covered by the policy in other respects.

It is perfectly clear that the insurance company did not, by Clause 3, undertake to defend any legal proceedings, except those of which it had been given notice and the papers in which had been forwarded to it, as required by Clause 2. In fact the insurance company would have no notice of any claims or proceedings, except by such means, and the provision requiring such notice of proceedings or claims to be given to the insurance company, plainly and expressly limits this notice to claims arising out of an accident *duly reported* and "proceedings to enforce *such* claims."

We urgently insist that the court erred in holding that plaintiff in error, the insurance company,

was bound to defend the action even though notice had not been given according to the terms of the policy, and that the motion for judgment notwithstanding the verdict should have been granted, or the jury should have been instructed to bring in a verdict in favor of this plaintiff in error, and that the case should be reversed and remanded with instructions to the court below to render a judgment in favor of this plaintiff in error.

R. S. HOLT,

U. E. HARMON,

HUDSON, HOLT & HARMON,

Attorneys for The Frankfort Marine, Accident & Plate Glass Insurance Company.

8

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN B. STEVENS & COMPANY,
Plaintiff in Error,

vs.

FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,
Defendant in Error.

AND

FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,
Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY,
Defendant in Error.

No. 2255

REPLY BRIEF FOR JOHN B. STEVENS & COMPANY.

We desire to make a very brief reply to the brief filed by defendant in error.

(1) On page 25 *et seq* of the brief the authorities are distributed into eight classes, the eighth class being composed of the "Case at Bar," which is supposed to be *sui generis*, so that none of the authorities assigned to the other seven classes (all of which are confessedly opposed to defendant's position) are applicable, in the opinion of counsel.

The basis of the distinction seems to be that in the case at bar the requirement of notice was a "condition precedent," whereas in the other cases the requirement was a condition subsequent, and this contention is insisted on and the phrase "condition precedent" is reiterated on an average of three or four times to each page throughout the eighty-seven pages of the brief. In fact, there is literally nothing else in the brief.

We think it obvious that all this argument is entirely beside the mark. It has no relevancy whatever.

Thus, we may and do concede (aside from the question of prejudice) that the assured could not recover without complying with the condition requiring notice. Whether that requirement be termed a "condition precedent" or a "condition subsequent," or what not, assured was bound to comply therewith in order to recover. We have not and do not question this. What we contend is that the requirement under consideration must be reasonably construed so as to be possible of fulfillment. We maintain that the policy does not require notice, either immediately or within ten days, un-

less the assured was informed of the accident. Consequently, it follows that the requirement for notice "immediately, or at the latest within ten days," was fully complied with by assured when it gave notice the same day it learned of the accident. So that it is too plain for contradiction that the issue of law for decision is, not whether a recovery will be allowed where the requirement for notice has been utterly disregarded, but whether the giving of notice "immediately, and within ten days" of the date assured learned of the accident, *was a full compliance with the requirement for notice.* Defendant's brief is a labored effort to prove that the assured cannot recover without complying with the requirement for notice. But our contention is that we have fully complied with such requirement. It follows, therefore, that the argument of defendant in error is utterly irrelevant and immaterial. It is in no way pertinent to the question for decision.

On page 53 of the brief defendant admits that the entire argument was written before this Court had decided the case of the *Northwest Lumber Company.* In that case this Court does not once use the phrase "condition precedent," but has considered the question exactly as it is presented in our opening brief, viz., as a question of interpretation of a written instrument. What did the parties mean by requiring notice "immediately, and at the latest within ten days," of the occurrence of an accident? We say it means notice immediately or within ten days

from the date assured learned of the accident, assuming, of course, that the failure to learn of the accident was not due to negligence on assured's part. The Court held that the policy involved in that case was satisfied by notice within a reasonable time after assured learned of the accident. The clause there involved is as follows:

> "Assured on the occurrence of an accident in respect of which claim can be made under this policy shall at once give written notice thereof to the company" * * *

This phrase is at least as definite in fixing the date of giving notice as the policy in controversy, requiring notice immediately, and at the latest within ten days, or within the time required by any state law. On page 38 of the brief counsel concedes that but for the ten-day feature notice within a reasonable time after learning of the accident would be sufficient. This concession utterly destroys counsel's whole argument. Thus, giving the word "immediately" its legal significance, the policy would read:

> "That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall within a reasonable time, and at the latest within ten days *after learning thereof*" give notice, etc.

The purpose of the phrase "within ten days" was to place a limitation upon the indefiniteness of the term "immediately" as defined by repeated judicial decisions. As counsel say, it is fair to presume that the insurance company was familiar with the meaning courts had uniformly placed on

the word "immediately," and they proposed to make it definite by restricting 'the reasonable time" in which to give notice after learning of the accident to a period of ten days, except in states where by statute a longer period is allowed; as, for instance, in Texas, where ninety days is allowed. In such states the company still does business, notwithstanding it would be supposed from counsel's argument they would withdraw in a panic. This last consideration speaks more than volumes for the good faith and candor of the argument concerning a "condition precedent."

Counsel say on page 17 of the brief that no reason is suggested why assured did not learn of the accident, and on page 18 that mere ignorance is no excuse unless it be shown that notice would have been given sooner had the assured been advised of the accident.

As to the first suggestion, we need hardly remind the Court that it was shown that the injured party remained at work for more than a month after the alleged accident, and did not claim, or even know, of his own injury until long afterwards when he went to the hospital and submitted to an examination. He then, for the first time, attributed the injury to an accident he claimed to have met with weeks before while employed by assured Under these circumstances it was, of course, impossible that assured should have known of the accident until the injured party made his claim through his attorneys, and the company was notified

the same day. This also answers the second suggestion, that it does not appear that notice would in any event have been given sooner, and shows conclusively that assured knew of and complied with the requirement of the policy for notice.

In reply to our contention that under the laws of Washington a compensated surety must show prejudice, counsel say that the allegation in the answer that the policy was made in Washington and governed by its laws was only for the purpose of enabling the Court to take notice that there is no statute in this state fixing the time in which a requirement for notice must be complied with. But we take it, counsel cannot limit the allegations of its pleadings to such purposes as suit its interests. The fact remains that this policy must be judged by the laws of Washington, and the case of *Beebe vs. Redward*, 35 W. 615, is conclusive of the proposition that in this state a compensated surety, or indemnitor cannot avoid its obligation for a mere technical breach of the contract. Prejudice must be shown. The Court say:

> "The surety therefore cannot complain of *any* breach of the contract * * * that does not operate to his prejudice."

In this case the company executed a bond of indemnity, indemnifying the obligee for breach by a contractor of a building contract. One of the terms of the contract provided that the building should be completed on August 1, 1901. The contract of indemnity executed by the United States Fidelity & Guaranty Company provided:

> "That any suits at law or proceedings in equity brought against this bond, to recover any claim hereunder, must be instituted within six months after the first breach of said (building) contract."

The contractor breached his contract by not completing the building in time. This breach was waived by the owner accepting the building in December, four months after the time stipulated.

The fidelity company contended that suit was not brought within six months from the date of the breach of the contract, and was therefore barred.

But the Court say:

> "To relieve on this ground there must be a showing not only of departure from the terms of the contract but that the position of the surety has been so changed thereby as to result in prejudice to him."

Lazelle vs. Empire State Surety Co., 58 W. 589.

This also was an action on a bond of indemnity securing performance of a building contract. The obligor contended that notice of default was not given in time. The Court say:

> "The notice provision is inserted for the benefit of the surety. It is to give him notice of the doing or neglecting to do something by the contractor which will result in loss to the owner primarily, and thus subject the surety to a liability. And since the purpose of the provision is protection to the surety, when it appears that notice is given

> in ample time to enable the surety to protect itself against loss or damage, it is sufficient, since it has accomplished that which it was the intent of the notice to accomplish. Hence, the rule has been established that the surety cannot complain when it can show no loss or substantial damage by reason of the failure to receive notice in the exact and technical language of the contract, or make it appear that its failure to receive notice has prevented it from taking proper steps for its protection." (Citing many authorities.)

The requirement for notice of a default under a building contract is just as important as notice of an accident. In either case, if the notice be not given and prejudice result the surety is and should be discharged, at least to the extent of the damage it has thereby sustained. But, in either case, since the purpose of the requirement is to enable the surety to protect itself, when notice has been given in ample time for that purpose no reason in law or morals is perceived why a compensated surety should be discharged from its obligation. At any rate, such is the law as it is written in Washington, and by it this case must be judged under defendant's own allegations. No distinction in principle is perceived between the case at bar and the cases cited. Evidently counsel so understood it, as it was unwilling to try its case in the State Courts, but removed it to the Circuit Court, hoping, no doubt, thereby to escape the Washington rule requiring a compensated indemnitor to show prejudice in order

to be discharged from its obligation.

We will answer but one other statement in defendant's brief, not because of any bearing it has on this case, but because of the outrageous aspersion on the character of the American Courts, both state and federal.

On page 32 of the brief the following occurs:

> "After reading some of the opinions dealing with the question of the giving of notice under insurance policies, and observing the ingenuity and dexterity employed by those Courts to escape the conclusions which a proper regard for the fundamental rules of law should force on them, it is refreshing to read the clear and dignified opinion of a Court not animated by a desire to reach a forced conclusion, such as the one in the case of *Victorian Stevedoring Co. vs. Australian Acc. Ins. Co.*, 19 Victorian, 139."

Counsel then quotes from what is evidently an Australian case, and which apparently supports his contention, although not enough of the facts are stated to enable one to judge.

As a member of the bar of an American Court we desire to record a protest against this insulting reflection upon the learning and integrity of every American Court, state or federal, and with the observation that the necessity which counsel found himself under to resort to the antipodes for an authority which would support the unreasonable—we may say, the dishonest and unjust construction which is sought to be imposed on this contract—is a sufficient proof of its utterly untenable nature,

so far as American authority is concerned, we submit our case.

Respectfully submitted,

J. W. QUICK,

L. B. da PONTE,

Attorneys for Plaintiff in Error.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiff in Error,* vs. JOHN WILBUR WARD, *Defendant in Error.*	No. 2249 Petition for Rehearing.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The undersigned, on behalf of the plaintiff in error herein, present this petition and respectfully request that a rehearing of the cause be granted by this court for the following reasons:

I.

This court erred in affirming the action of the court below in denying the motion of plaintiff in error for a non-suit, and erred in affirming the action of the court below in refusing to give to the jury a direction to return a verdict for defendant in that court.

II.

This court erred in affirming the admissibility of evidence as to the crowded condition of said train after the accident, and in affirming the admissibility of evidence as to the difficulties of witness H. B. Light in boarding the train twenty-five minutes after the accident occurred.

III.

This court erred in affirming the propriety of instructions E, F, G and H, set forth in full, transcript pages 188 and 189.

IV.

This court erred in affirming the propriety of instruction M, as follows:

> "I also instruct you that it is the duty of every public carrier of passengers to employ sufficient servants for the protection of such passengers, and it is under obligations to take due care to secure the safety of a passenger who is upon its premises peaceably for the purpose of boarding its trains."

ARGUMENT

We shall endeavor very briefly to set forth the points upon which we rely to sustain our contention upon this petition. Addressing ourselves to the first point mentioned, namely, that the trial court erred in refusing to grant defendant's motion for non-suit, and in refusing to direct a verdict for defendant,

and the error of this court in affirming such action, we desire to state that we are so confident of the justness and reasonableness of our contention upon these points in our appeal in this case, that we feel that if the court ruled against us it was because of our inability and unfitness to make the points clear to the court, rather than from want of soundness in our position, or authorities to sustain them. Furthermore, we cannot but feel as we read the opinion of this court, that the court has strained in the interpretation of the evidence in this case to reach a conclusion affirming the judgment of the court below, to such an extent that it would seem that the mere fact of the injury itself has caused the court to feel the necessity of fixing the liability for the accident upon this plaintiff in error.

If the action of the trial court in denying the motion for the non-suit and in refusing to direct a verdict for defendant, was proper, it must have been predicated upon the proposition that there was evidence of negligence proximately contributing to the injury on the part of defendant, and no negligence upon Capt. Ward's part. In the evidence produced and in the opinion of this court upon the hearing of the appeal, three factors are mentioned and considered as being important in arriving at such a conclusion. These three factors are, First: The speed with which the train came into the station; Second: The failure on the part of the Railroad Company to properly regulate the movement of the

crowd, or protect it by means of servants; Third: The overcrowded condition of the cars and lack of adequate accommodations for all intending passengers on the train.

If it can be shown that the actions of the servants of the plaintiff in error with regard to these three matters did not constitute negligence and did not contribute or proximately cause the injury complained of, then our contention must be sustained.

It seems clear to us that no connection can be made by any argument, however ingenious, between the speed at which the train came into the station, and the injury to Capt. Ward. This is not the case of a person being hit by a moving train, where the person stood at a place toward which the train was moving, and by reason of its speed was unable to place himself out of danger. In fact, it is not a case of being hit by a train at all. It is a case of being run over by a train after having been pushed under it by other persons. The engine and several cars of the train had passed the spot where Capt. Ward was standing before the accident occurred. As is stated in the opinion of this court, some witnesses testified that the train came in in such a manner that they thought it was not going to stop, while others testified it came in in its usual manner and stopped at its usual place; in fact there is no testimony by those who claim the speed was excessive

that the place of stoppage was other than the usual one. This evidence, whichever contention may be taken, does not affect the question of the negligence of the Railroad Company in this case. When the train came into the station it was a signal of danger to those standing near the track, and the more rapidly it approached the more quickly was conveyed to the persons standing nearby, the necessity of seeking a place of safety. The track itself, and the approaching train, are both signals of danger. Let us suppose for a moment that Capt. Ward was awaiting the arrival of this train, and that the train was scheduled to stop at Paso Robles, but from the speed with which it came into the station, it appeared that it was not going to stop. If, in such a case, Capt. Ward had attempted to board the moving train, and had been thrown underneath and injured, could it be said that the Railroad Company would be liable for the injuries suffered by him because of its negligent failure to stop the train at a station where it was scheduled to stop? So, in this case, the fact that the train came into the station rapidly and appeared as if it might not stop, would be no justification for an intending passenger to put himself in a position with reference to the train where injury would be likely to result. Furthermore, if the train had slowed down to a speed of from two to five miles an hour some hundreds of feet before coming to the station, and had continued at that slow rate of speed to the place where it finally stopped, the movement of the crowd

to board the train, and take advantage of the accommodations offered, would have been precisely the same. This court says in its opinion: "Surely we cannot say as a matter of law that a train advertised to stop at a station, and which came into the depot at a fast rate, would repel a crowd of passengers waiting to board it, rather than draw them closer in a general endeavor to secure a position where they could get aboard and obtain seats. It was for the jury to apply its common sense to such a state of facts." We take it to be a matter of common sense, and a conclusion to which any and every reasonable person would come, that a swiftly moving train would naturally repel a crowd of passengers waiting to board it, rather than draw them closer, and that any and all persons would naturally be willing to walk more closely beside a slow moving train than beside a fast moving one. It seems clear to us, therefore, that the speed of the train, as an element of negligence on the part of this plaintiff in error, is entirely eliminated from consideration.

Now let us consider the question of the alleged negligence on the part of this plaintiff in error and its servants, in its failure to protect the passengers who were awaiting the arrival of this train.

The mere fact of the happening of the accident to Capt. Ward creates no presumption of negligence, nor does it require a strained interpretation or construction to be placed upon the evidence to

create a liability. The happening of the accident does not connote a failure to take precautions against such an occurrence. It is in evidence in this case, and this court has stated in its opinion, that the crowd at the station was quiet and orderly, and it is also in evidence that the movement of the crowd toward the coaches available for its accommodation, was the usual, customary movement of people desiring to board a train. The defendant in error says himself—"The crowd, as the engine passed me, absolutely never moved."

Even if we assume that the plaintiff in error should have anticipated that a large number of people would take advantage of the excursion rate on this occasion, and that a large crowd would be awaiting the arrival of this train, there is nothing in these facts alone, and nothing in all the evidence besides, upon which the necessity for extra precaution is to be predicated, except the mere fact of the accident. The open character of the station grounds is apparent from the sketch in the transcript, and there was ample room for a much larger crowd to have awaited the arrival of the train. Reasonable care had been exercised to provide a safe place for the intending passengers. The moving train itself constituted a far better warning of the danger of crowding than any servants of the plaintiff in error could have given. The plaintiff in error is not required to so safeguard its intending passengers against their own negligent or foolhardy acts, nor is

it required to make it impossible for the intending passengers to be injured by the negligent acts of third persons. If the railroads are to be held to such a degree of care, they are made insurers of the persons of all intending passengers. The courts have never gone to this extent, even in the matter of carriage of passengers on their trains. In fact, the carrier is bound only to use ordinary care, in view of the circumstances, toward intending passengers who are awaiting the arrival of a train at a station. Falls vs. San Francisco, etc. R. R. Co., 97 Cal. 114. This case has been followed in many jurisdictions.

In short, the Falls case—which we are induced to believe has not received full consideration at the hands of this court—has been accepted in nearly every jurisdiction for the evident reason that it is based upon a logical conception that can not be successfully questioned. It proceeds upon the general theory that while the intending passenger is under his own control, it is expected that he will exercise his faculties in such a manner as not to bring injury upon himself; that the responsibility of the carrier for the highest degree of care does not commence until it has physical control of the passenger.

In the case of

Woodbury v. Maine Cen. R. R. Co., 43 L. R. A. (N. S.) 684 (85 Atl. 753),

which was a case of injury to the plaintiff, who went upon the station grounds to enter the defendant's cars, the Supreme Court of Maine, by Savage, J., said:

> (1) "The defendant owed him the duty of exercising the care for his safety which a railroad company owes its passengers, while they are upon its platforms or grounds, either going or coming from trains. Care in the highest degree was not required. The care owed to a passenger in a moving train was not required. It was not required to keep the passenger absolutely safe. Its only duty was to exercise ordinary care to maintain the passageway in question in such a reasonably safe and suitable condition that passengers, who were themselves in the exercise of ordinary care, could walk over it safely. Maxfield v. Maine C. R. Co., 100 Me. 79, 60 Atl. 710.
>
> "(2) The plaintiff was bound to exercise ordinary care. All passengers are. But, unlike the passenger on a moving train, he was in a position to use his eyes and guide his steps. He could see and avert danger, if it existed. He could, by attention, protect himself."

We fail to observe any answer in the Court's opinion to the position taken by the plaintiff in error as to the rule announced in the Falls case:

> "The defendant in error was at the station in the full possession of all his mental and physical faculties. The carrier had no physical or other control of him. He might, if it

pleased him, have taken this train or waited for another. No direction was held out to him as to his personal conduct. There were no appearances of control upon which he was either expressly or impliedly invited to rely. He could, if he desired, have chosen his associates and his position on the ground. The speed at which he would approach the train was a matter of his personal control. It was all optional with him as to how he should go upon the train. No physical control was exercised, or attempted to be exercised over him whatever. He was to all purposes a free agent, with the obligation resting upon him to act with discretion and care for his own safety. The rule for the highest degree of care is invoked only where there is a control with the carrier. If the passenger surrender himself to the direction and custody of the carrier, he then abandons his own course of action, and because of this control throws the responsibility for his protection upon the carrier; and because of this condition of abandonment of person and care, the custody rests with the carrier, and the law imposes upon the latter the exercise of the highest degree of care. There is another reason for the application of the rule for the highest degree of care, and that is that the increased hazards of transportation are only present when the passenger is in transit, and hence the greater the danger the higher the degree of care. In all the cases apparently sustaining the rule contended for by the defendant in error, and in which the court instructed the jury, the element of per-

sonal control of the intended passenger was absent, so that this case can be easily differentiated from the cases relied upon by counsel for the defendant in error. The rule invoked by the court below, in itself a strict one, should not be applied unless the elements for its application are present. It is conceded in this case that there was no control, or attempt to control the defendant in error while he was on the platform of the station or on the grounds of the station. To put it more accurately, he was allowed to act as his prudence might dictate. As the plaintiff in error had no control of him at this time, it can not be held to the strict accountability employed as a rule by the learned judge who tried the case in the court below."

In addition to the cases cited by plaintiff in error, the Falls case is sustained by the rule thus expressed in

Fremont, E. & M. V. R. Co. v. Hagblad, 4 L. R. A. (N. S.), 257:

"Therefore, with regard to platforms, stairs, waiting rooms in a station, the ground surrounding it, and other premises of a railroad company, its obligation to passengers is only one of ordinary care, in common with that of all other occupants of land or buildings inviting persons to enter thereon for compensation, since passengers are no more endangered in such places than they are on similar premises not belonging to a railroad company. Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E.

74; Kelly v. Manhattan R. Co., 112 N. Y. 443, 3 L. R. A. 74, 20 N. E. 383; Lafflin v. Buffalo & S. W. R. Co., 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; Falls v. San Francisco & N. P. R. Co., 97 Cal. 114, 31 Pac. 901; Moreland v. Boston & P. R. Corp., 141 Mass. 31, 6 N. E. 225; Jordan v. New York, N. H. & H. R. Co., 165 Mass. 346, 32 L. R. A. 101, 52 Am. St. Rep. 522, 43 N. E. 111; Stokes v. Suffolk & C. R. Co., 107 N. C. 178, 11 S. E. 999; McDonald v. Chicago & N. W. R. Co., 26 Iowa, 124, 95 Am. Dec. 114; Southern R. Co. v. Reeves, 116 Ga. 743, 42 S. E. 1015."

All the witnesses testified that the crowd was orderly before the train came in, and we have the injured man's testimony that absolutely no movement occurred until after the engine had passed him. What warning, then, did the plaintiff in error have of the necessity for extra precaution? This was not a case similar to the case of a throng of children on a picnic, but was a crowd of grown men, accustomed to discipline, and sufficiently mature to appreciate the dangers incident to such a situation. As we have stated before in our brief upon appeal, there was nothing in the nature of the crowd attracted by the excursion to put the plaintiff in error upon notice that extra protection would be required, and further, that ordinary care, under the circumstances, such as suggested in the opinion of this court, would have been utterly inadequate to prevent the accident.

Whether the train was empty or crowded, the natural impulse of the crowd is to endeavor to get on as soon as possible and get a seat, and of what avail would a few servants of plaintiff in error have been to warn the crowd by voice not to hurry or push? The only protection which the railroad company could have prepared which would have been sufficient, under the decision in this case, would have been a substantial, permanent high iron fence, with a turnstile, so that it would have formed an impassable barrier between the crowd and the train, through which they could only pass, one by one. In some of the modern terminals, such barriers exist, but even there they are not erected for the protection of the passengers, but for the convenience of the railroads, so that tickets may be inspected before the passengers board the trains. Such an arrangement would be impossible at a way station, where passengers may board trains without showing their tickets, and where the station grounds and tracks must be open and passable for the proper conduct of the business.

We say, therefore, that nothing was left undone by the plaintiff in error, which, in the exercise of ordinary care under the circumstances, should have been done to control the crowd, and that it was not negligent in that respect. Furthermore, we maintain that Capt. Ward was negligent in walking so close to the moving train that he was likely to be jostled against it, or under the wheels. We be-

lieve that his conduct in this regard, having in mind both the approaching train, and the many other people waiting and anxious to board it, as he was, falls precisely within the rule laid down in Holmes v. South Pacific Coast Ry. Co., 97 Cal. 161. That was a case of an intending passenger awaiting the arrival of a train, and walking up and down beside the track. He had walked this way for from five to eight minutes, and had just turned his back to the direction from which the train came, when it approached. The bell was ringing, but no whistle was sounded until within about eight feet of deceased, and when he heard the whistle, he made a startled movement, which landed him on the track, and he was struck. The court said, "Upon these facts, it is clear to us that the judgment must be sustained, as the deceased, in walking where he did, in dangerous proximity to the track of defendant, without looking or listening for the approach of the train for which he was waiting, and finally stepping partly upon the track in front of the moving engine, was guilty of such contributory negligence as defeats plaintiff's rights to recover in this action. Indeed, it would be difficult to imagine a clearer case of contributory negligence upon the part of a person injured than is presented by the evidence in this case."

In this connection, we desire to bring to the court's attention the rule of law that even though

the evidence is all one way on a certain point, if that evidence is inconsistent with the happening of the event, it will not be considered. In this case all the witnesses who testified on the matter at all, stated that Capt. Ward was not trying to board the train when he fell. In fact, the witness Capt. Light, in a part of his testimony quoted in the opinion of this court, said—"He did not try to board it. I know, because there was people between him and the train." We ask, in all sincerity, how it was possible if "there was people between him and the train", that he should have been pushed through those people and under the train, feet first, so that his leg was run over by the moving wheels? It seems to us that Capt. Light, in his loyalty to his fellow officer, has placed the defendant in error in a position where he could not, in the very nature of things, have had an accident. If that is the case, and the accident occurred, it seems to us clear that Capt. Ward must have been in the forefront of the movement, and that, by his own negligence, combined with that of the others crowding behind him, the accident resulted.

This brings us to the further consideration of the negligent acts of the crowd. Here was an open asphalted surface, level with the tracks, where the crowd was standing, ample to accommodate them all, with no necessity for rushing and crowding when the train arrived. Must the railroad company be presumed to have known that

they would act in a negligent and reckless manner, regardless of their own welfare and the welfare of others in the crowd, and must it have made such preparations as to make such acts impossible? The railroad company had a right to believe that they would move toward the train and board it in an orderly manner, using reasonable care for their own safety and for the safety of others, and if the contrary is true, how apparent it is that train guards, even in large numbers, would have been utterly inadequate. It would have taken a number sufficient to oppose the crowd successfully with physical force, under such circumstances.

We are thus brought to the inevitable conclusion that it was not any negligence on the part of plaintiff in error that caused the accident, or contributed proximately thereto, but that it was the negligence of defendant in error, coupled with the negligence of others in the crowd, that caused the accident. Even if we absolve the defendant in error of negligence, the reckless and negligent conduct of the others in the crowd in shoving him against and under the train, must be held to be the sole proximate cause of the accident; conduct which could not have been foreseen by plaintiff in error, and which its duty to the intending passenger did not require it to guard against.

To further elaborate these points it may be observed that the defendant in error relies in his

complaint (trans. p. 7, par. 7) upon the following allegations, as showing actionable negligence:

1. That "said defendant could accommodate only a small number of said crowd (500) with transportation";

2. And "defendant then well knew it had negligently failed in preparation to accommodate said crowd";

3. That "there would be a general movement and surging of such crowd to obtain and secure the said accommodations that then existed upon said train";

4. That "it would be extremely dangerous to approach said station * * * except at a rate of speed whereby said train was under perfect and instant control";

5. That "defendant well knew that it had neglected and failed to employ any means to maintain order in said crowd."

It is still a principle of law that in order to entitle an injured person to recover in an action of this kind, it must appear that the alleged negligence was the proximate cause of the injury. This is fundamental and is universally recognized.

1.

Taking the grounds alleged in the order stated, it is beyond the peradventure of a doubt that the defendant in error was entirely ignorant of this condition if it existed. Not being aware of the alleged lack of accommodation, such fact, if such it be, could by no means have operated upon his

mind, influenced his actions, or entered as a factor into the case. That which was not within his knowledge did not cause him to move forward toward the train. If, however, it be claimed that he must have known it inferentially, and as a result of this knowledge engaged in the scramble to gain a part of this limited accommodation, then his own act became and was the proximate cause of his injury, and he certainly can not recover.

2.

This subdivision of the alleged grounds entitling defendant in error to recover is practically answered by the considerations advanced under the foregoing head. However, it may be observed that it is at least passing strange that the railroad company should have known that it negligently failed in preparation when ample grounds were furnished for the people waiting to take the trains; that they were not overcrowded; that there was not the slightest indication that any facility was lacking to handle the crowd.

3.

The facts detailed by the witnesses for the defendant in error put it beyond question that this is a case where there was no reason to induce the belief in the mind of any person that there would be a "surging of the crowd"; on the contrary, the record is replete with declarations of witnesses to the effect that the crowd was orderly; that the

grounds were not overcrowded; no movement of any kind was engaged in by the crowd or any person there which would have caused the most careful man to believe that there was to be a rush. The railroad company had no better opportunity of observation on this score than the defendant in error had. He certainly anticipated no danger and made no effort to guard against the alleged surging crowd. He must have participated in the movement to reach the train regardless of surrounding circumstances. Certain it is that with all his friendly witnesses, no one tells of his resistance to the movement of the crowd or his protestations against any condition that existed at that time. The conditions as presented to him were of a character calculated to assure him that it was reasonably safe for him to proceed to the train as his own voluntary act. If this was the assumption under which he acted with equal powers and opportunities of observation, it appears clear to us that the railroad company can not be charged with negligence in this respect.

4.

We have heretofore shown in an earlier presentation of this case that the rate of speed can not be either alone or in connection with the other alleged acts of negligence the proximate cause of the injury. If the train approached the station at a rapid and dangerous rate of speed, it would be a proclamation of danger, and the ordinarily pru-

dent man would not be impelled to get in closer proximity to the train. The opinion states that Captain Ward was jostled or fell. Assuming this to be the fact, what relation does the speed bear to this act of falling or being jostled. If the train were coming in slowly it certainly would be an inducement for a greater rush because of the absence of the elements of danger, and the crowd would not then hesitate to approach the slowly moving train. By no method of reasoning can the speed of the train become a factor in this case, except so far as it affected and induced the crowd in its movement toward the train. We believe that a rapid speed would naturally and logically be a deterrent, and that it is so evident that no further discussion on this branch will be engaged in, except to say that Captain Ward in the full possession of all his faculties elected to go with the crowd, notwithstanding the actual speed of the train, whatever it may have been.

5.

Again, we repeat that there was no disorder in the crowd and nothing from which it could reasonably be apprehended, nor is it shown in evidence, that any act of the crowd caused the injury to Captain Ward. If, as the Court assumes, he "fell", then his fall, so far as the evidence discloses, was while he was in physical control of his own person (trans. p. 93). In point of fact, Captain Ward did not know or testify how the

act occurred. He says, "I don't know that any individual pushed me under the train at all. I don't know whose body was in contact with me when I fell" (trans. p. 100).

A casual consideration of the evidence in connection with the allegations of the complaint leads one to the conclusion that no ground relied upon by defendant in error is the proximate cause of the injury. In order to constitute a proximate cause for the injury it must appear that the alleged acts of negligence were "the nearest, the immediate, the direct cause" (Anderson's Law Dictionary), because proximate cause means an act concurring directly in producing the injury.

Troy v. Cape Fear & Y. C. R. Co., 6 S. E. 77.

In accordance with the settled rules, negligence can not be regarded as the proximate cause of an injury so long as it appears that some other thing contributed to produce the result.

Moore v. Inhabitants of Abbot, 32 Me. 46.

To bring this case within this rule of law, it must appear that the acts of plaintiff in error charged as negligence were the proximate cause in the sense that they were events "which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred."

Bosqui v. Sutro R. R. Co., 131 Cal. 390.
Behling v. S. W. Penn. Pipe L., 160 Pa. 359.
West v. Ward, 77 Iowa 323.

The test of proximate cause is whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that the final result can not be said to be the natural and probable consequence of the primary cause.

Quinlan v. City of Philadelphia, 205 Pa. St. 309.

Submitted to the central idea, the controlling principle deducible from all the decisions, the case of the defendant in error signally fails to show actionable negligence, because there is no element connecting the alleged causes with the injury; for instance, the alleged speed of twenty-five miles an hour did not do it, because it must be conceded that the train was not going at that rate, or any excessive rate, when Captain Ward started for the train or when the accident occurred. Defendant in error testified "when I heard the—possibly the brakes go on—and about that time a surge of the crowd separated us" (trans. p. 92). Nor can it be said that there was any connection between the alleged speed of the train and the surging of the crowd, because the crowd did not surge until the train slackened its speed; nor the alleged lack of accommodation, because Captain Ward did not know anything about the accommodations. In other words, there is an unmistakable break in the

chain of causation. This we respectfully submit was supplied by the sympathy of the jury.

The essential element to constitute a proximate cause is palpably absent, and its absence makes this case one unsupported by required evidence; hence, a question of law is presented.

Loftus v. Dehail, 133 Cal. 219.

The previous discussion brings us naturally to the consideration of the propriety of the instruction—"I also instruct you that it is the duty of every public carrier of passengers to employ sufficient servants for the protection of such passengers, and it is under obligations to take due care to secure the safety of a passenger who is upon its premises peaceably for the purpose of boarding its trains." We maintain that such an instruction requires the plaintiff in error to *insure* the safety of its passengers, and that it is, therefore, an instruction which goes beyond what the law requires of plaintiff in error. All the argument on this point, supra, is applicable to our contention, and we will not repeat it. This court, however, in its endeavor to justify the instruction, points out that it is properly qualified, when taken in connection with the other instructions given. Such is not the case, as a careful consideration of those instructions will show. One of the other instructions was that a common carrier "owes to its passengers the duty to exercise the highest degree of care for their protection and safety which is consistent with

the practical operation of its road; and if you find from the testimony in this case that the plaintiff was on the platform to take a train with a ticket in his pocket, he was within the meaning of the rule—a passenger. That is, the railroad company owed him the same degree of care and protection that it owes to a passenger in actual transit." Such is not the law in California, at least. As to the intending passenger at its station, the railroad company owes a duty of reasonable care, under the circumstances, while as to the passenger in transit, it owes the highest degree of care. And the reason for this is apparent. The intending passenger is under his own control entirely as he awaits the train, and can use care to protect himself, while in the case of the passenger upon the moving train, his safety is entirely in the hands of those operating the train and the railroad. Nothing that he can do will prevent the train from running into an open switch, or colliding with another train. He can only sit passively and trust to the servants of the railroad company, and if he refrains from jumping off the moving train, or from doing any other act of negligence on his part, he has the right to rely on the exercise of the highest degree of care on the part of the employes. Such a difference in the two situations is so clear, and the need for the distinction in the degree of care required so plain, that without an extended review of authorities, we are prepared to say that it is uniform throughout the courts of this country.

If the instruction complained of, therefore, is qualified only by another erroneous instruction, how well it is qualified! Let us take the phrase—"highest degree of care for their protection and safety consistent with the practical operation of the road." That is a statement—not a definition. Therefore, the jury, instead of looking to that instruction, even if not erroneous, to qualify the other, would naturally look to the other to find what the "highest degree of care" means. And in the instruction complained of they find that it goes to the extent of "sufficient servants for the protection of such passengers",—a body-guard forsooth,— and "to take due care to *secure* the safety of a passenger"; that is, make it impossible for him to be the victim of either the negligence of the servants of plaintiff in error, his own negligence, or the negligence of third parties.

We now come to consider the crowded condition of the train, after the accident, as evidence of negligence on the part of plaintiff in error. We have endeavored to look at this phase of the case from every possible angle, and have been unable to perceive any connection of this incident with the issues of this case. In this matter, this court said in its opinion, "This testimony may not have been competent from some standpoints, but as against the general objection made *it was relevant in that it helped to explain to the jury the extent of the crowd that had theretofore surged toward the cars*

and bore out the accuracy of the judgment of the people to the effect that accommodations were very limited, and thus the jury were better able to draw conclusions as to the conduct of the crowd when the train came in." For the life of us, we are unable to see how the court reached this conclusion. *It certainly affords no light on the question of how many were in the cars before the train arrived at Paso Robles.* The testimony to the effect that there were two day coaches and a smoking car was certainly all that was relevant or material as to the accommodations for the crowd, and that the movement of the crowd would have been different had the coaches been empty, as they may have been for all evidence to the contrary, has not even been suggested.

It is true that if this had been an action for damages for failure to provide accommodations for a passenger, this point would have been proper to consider, and the instructions complained of would have been justified. But the giving of these instructions, lettered E, F, G and H, on the duty of the carrier to run regular trains, provide safe and ample accommodations, and not to overcrowd its trains, was, in effect, holding plaintiff in error up to the jury as negligent as a matter of law, *in connection with this accident*, when such instructions had reference only to a condition that existed many minutes after the accident had oc-

curred. As was pertinently said in our brief upon appeal, the waiting crowd could have had no knowledge of the empty or loaded condition of the cars in the train before its arrival. The most that they could have known was that it was not a special train on the schedule, but one of the regular through trains operated by plaintiff in error, and as such was not expected to be made up for their special accommodation. So that we say, in holding plaintiff in error up to the jury as a law breaker, by giving these instructions, which could give no legitimate aid to the jury in determining the liability of this plaintff in error upon the *issues involved* in the case, the trial court committed prejudicial error, requiring a reversal of the judgment by this court.

To sum up our position, briefly, we believe that a careful, fair consideration of the testimony shows that a non-suit should have been granted, or an instruction to find for this plaintiff in error should have been given, as requested; that the instructions complained of were erroneous, and highly prejudicial to this plaintiff in error; both as placing a greater burden upon it than is imposed by law, and as presenting it in a more unfavorable light to the jury than the issues of the case required or permitted. Upon these considerations, therefore,

we respectfully urge the court to grant a rehearing of this cause.

All of which is respectfully submitted.

J. W. McKinley,
R. C. Gortner,
Attorneys for Plaintiff in Error.

W. R. Millar,
Frank McGowan,
of Counsel.

CERTIFICATE OF COUNSEL.

I, J. W. McKINLEY, Counsel for the Plaintiff in Error in the above entitled action, do hereby certify that, in my judgment, the foregoing Petition for a Re-hearing is well founded and that it is not interposed for delay.

Dated, at Los Angeles, Cal., October 1913.

.....